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REEVES.
HISTORY OF THE ENGLISH LAW.

EDITED BY
W. F. FINLASON.

VOL. V.

REEVES'
HISTORY OF THE ENGLISH LAW,
FROM THE
TIME OF THE ROMANS
TO THE
END OF THE REIGN OF ELIZABETH.

WITH NUMEROUS NOTES, AND AN INTRODUCTORY DISSERTATION ON THE
NATURE AND USE OF LEGAL HISTORY, THE RISE AND PROGRESS
OF OUR LAWS, AND THE INFLUENCE OF THE ROMAN
LAW IN THE FORMATION OF OUR OWN.

BY
W. F. FINLASON, Esq.,
BARRISTER-AT-LAW.

A New American Edition,

COMPLETE IN FIVE VOLUMES.

VOL. V.

FROM THE REIGN OF EDWARD VI. TO THE END OF THE
REIGN OF ELIZABETH.

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HISTORY OF THE ENGLISH LAW.

CHAPTER XXXI.

EDWARD VI. (a)

THE REFORMATION ESTABLISHED—ACT OF UNIFORMITY—LAWS AS TO VAGRANCY—TIPLING AND GAMING-HOUSES—PAYMENT OF TITHES—TRAVERSE OF OFFICES—ADMINISTRATION OF JUSTICE—CRIMINAL LAW—REPEAL OF TREASONS AND FELONIES—HOUSE-BREAKING—BURGLARY—PRINCIPAL AND ACCESSORY—OFFENCES AGAINST THE COMMON PRAYER-BOOK—UNLAWFUL ASSEMBLIES—STEALING IN DWELLING-HOUSES—REVISION OF 25 HENRY VIII. AS TO BENEFIT OF CLERGY—TRIAL OF FELONS IN FOREIGN COUNTIES—BRAWLING—CLERKS-CONVICT—WITNESSES IN TREASON—WITNESSES AT CRIMINAL TRIALS—LAW OF REAL PROPERTY—ASSIGNEES OF REVERSION—CONDITIONS AND LIMITATIONS—OF FEOFFEEES TO A USE—REFORM OF THE ECCLESIASTICAL LAW—KING AND GOVERNMENT.

IT would hardly be expected that the short period of twelve years should be productive of much alteration in our laws, but these reigns, on the contrary, hold a distinguished place in our juridical history (b). An atten-

(a) The author had blended together in this and the next chapter the reigns of Edward VI. and Mary. How he should have been led thus to confuse the legal history of two reigns so entirely distinct and different, and upon many subjects utterly opposite, may almost appear unaccountable; and in the ensuing note the reasons which he suggests for it are noticed, and shown to be extremely unsatisfactory, while, on the other hand, reasons, it is conceived, cogent and sufficient, are given for treating the legal history of each reign separately. In this chapter, therefore, all that relates to the reign of Edward VI. will be found, and all that relates to that of Mary is transposed to the next.

(b) This will scarcely be considered a satisfactory reason for mixing up together the legal history of two reigns so distinct and different, and in many respects opposed, as those of Edward VI. and Mary. The notion that, because neither of these reigns occupied a long period in our history, therefore they were not distinct or distinguished, nor deserving of separate consideration, would be, it will be evident, erroneous. The importance of any period in the history of a nation does not necessarily depend upon its length or duration. When great causes of change have been at work for a long time, they operate rapidly, and when the awakened intelligence of a nation has once been directed to its laws, and powerful influences are at work upon it, a

tion to the reformation of religion in the former, and a determination in the latter to bring all things back to

few years cannot pass without presenting much that is of interest, as showing the operation of these influences and the effect of these causes. Contending influences were at work on the national mind at this period of our legal history, which have ever since been at work upon the highest and most important of all subjects, that of religion. In the reign of Edward VI. that influence gained the predominance which has ever since been predominant in the nation. And if ever there was a reign in our annals which required to be distinguished in our legal history, it was that of Edward VI., in which the law as to the established faith and worship of the country was first fixed and settled, to be disturbed, indeed, in the next reign, but to be restored in the ensuing reign, and to be afterwards confirmed and perpetuated to the present day; so that the Prayer-Books of Edward VI. form at the present day the basis of the ecclesiastical controversies of the established church. It may well seem incredible that any legal historian should have deemed such a reign unworthy of separate study, and should have jumbled it up with another reign, the religious policy of which was exactly the opposite. If, indeed, the changes of the law which took place in those times upon the subject of religion were merely the result of religious influences on the mind of the nation, and the predominance gained by the influence of one church or kind of religious persuasion was owing only to the *success* of its influence on the national mind, it might have been thought that the fluctuations of these influences belonged rather to social or political than to legal history. But the very reverse of this was the case. The alterations in religion were the result rather than the cause of changes in the laws, which were effected entirely at the will of the ruling power, that is, the *regal* power; for, as already has been abundantly shown, absolute power had been originated by Edward IV., and firmly established by the sovereigns of the Tudor dynasty; the crown had attained complete ascendancy, of which the royal supremacy in religion was the result, and all things, even the *religion* of the nation, were regulated entirely by the royal will. The royal power might, indeed, during a minority, be exercised in a great degree by a council; but still it *was* the royal power; it was a council ruling in the name of the crown; it in no degree represented the nation. Parliament during this period was subservient, and the religion of the country was a matter of law, and was determined by the ruling power of the state, which was the power of the crown. This, indeed, is proved by the very changes which took place in these reigns. No one will suppose that these changes really represented any fluctuations in national opinion or belief. The current of opinion, no doubt, was slowly but steadily drifting from the old towards the new opinions, but it did not alter and fluctuate so rapidly as to be Catholic under Henry, and Protestant under Edward; Catholic, again, under Mary, and Protestant once more under Elizabeth. These, indeed, were the changes in the religion of the nation as established by law, but they were changes of the law dictated by the ruling power; and though, in the course of the long reign of Elizabeth, the popular power began to acquire influence in the state, and lent all its weight to the new opinions, at present it was not so, and the changes in religion were dictated by the state. It is manifest that this cannot be displayed and observed unless the reigns are distinguished, and the laws of each reign as to religion. And on the other hand, *when* it is so displayed and observed, it exhibits an important fact, that the laws upon the subject of religion in this age, and in particular those laws of persecution which are abhorrent to modern ideas, were the result rather of the spirit of regal tyranny than of religious bigotry; at all events, of the union of the two, and could never have

their ancient state, almost wholly engaged the princes on the throne. These revolutions called for a frequent inter-

arisen had not the crown been absolute. Thus it was that these persecuting laws were enacted and executed, during these reigns, against that religion which was not the religion of the sovereign, whatever that might be, — showing that persecution really was provoked by opposition to the royal will. It is manifest that the principle which pervaded the religious policy of the dynasty was, that the subjects were bound to be of the religion of the sovereign, and that they were justly punishable if they were not. In that age this was deemed the practical result of the doctrine of the royal supremacy, and hence its denial in this as in the previous reign was rendered penal. This it is obvious, was the natural result of that ascendancy which the royal power had now attained, and which made the crown virtually absolute. It was on the changes made upon the subject of religion that this absolutism was made most manifest, but it equally pervaded all the legislation of the age, and rendered it vexatious, oppressive, tyrannical, and cruel. There is an entire consistency in the legislative policy of the different reigns of this dynasty, and in the measures of each reign. And in none more is this observable than in the present. Whether in the laws of dictation, and persecution, and confiscation on the subject of religion, in the stern and sanguinary laws as to treason, sedition or riot, in the cruel enactments as to vagrants, or the severe nature of punishments in general, the same spirit is apparent — the harsh, oppressive spirit of arbitrary power. In the last reign the royal supremacy had been established; in this reign it was carried out and exercised in changing the faith and worship of the church. In the last reign there had been no change in faith and worship, nor any alteration in the forms of religion, but there was an entire subversion of the fundamental principle of the ancient religion, which acknowledged the spiritual supremacy of Rome. The subversion of the supreme power in the church, and the substitution of another, of course involved the power in that substituted authority or supremacy to define, declare, or alter the forms of faith and worship. The late king had fully exercised that power in defining and declaring: the new king exercised it in altering the forms of faith and worship; but it was equally an exercise of the royal supremacy. That the royal supremacy was in fact a *spiritual* supremacy was manifest from its substitution for the *papal* supremacy, which notoriously was spiritual, and was not allowed to be exercised in temporal or political matters; and accordingly it was so held by the courts of law. Throughout the Year-Books the pope was called the “apostle,” to indicate his purely spiritual supremacy. And that (it was said) which the ordinary of any diocese might do, the same was used to be done within the realm by the pope, as supreme ordinary, who claimed to himself a supreme jurisdiction above all ordinaries; so that he used to make dispensations, corrections, and visitations within every diocese of the realm, as the ordinaries used to do. And he took from the bishops of the realm whatever power he pleased, so that his authority was looked upon as absolute, and bound the bishops, as his inferiors, in all his acts. And such authority and jurisdiction (it was said) as the pope used to exercise within the realm was acknowledged by the parliament in 25 Henry VIII., and other statutes, to lie in the king, so that he might lawfully exercise such jurisdiction as the pope used or was accustomed to exercise within the realm. And from him the authority descended to King Edward VI., so that he, *being supreme ordinary*, might do a spiritual act (as an appropriation) without the bishop, by virtue of his royal authority, supreme and ecclesiastical. And such other like acts of jurisdiction and authority he might do which the Bishop of Rome was used to do in this realm (*Grendon v. the Bishop of*

ference of the parliament. In the midst of these changes, some acts passed which had a great influence on the

Lincoln, Plowden's Reports, 496). So the law was laid down in the courts of law, according to the clear and plain meaning of the statutes as to the supremacy which gave the king a *spiritual* supremacy. And such a supremacy was asserted in this reign, and acknowledged. This spirit and that policy pervaded the last reign, and continued to prevail. Those who were possessed of any office resigned their royal former commissions, and accepted new ones in the name of the young king. The bishops themselves were constrained to make a like submission. Care was taken to insert in their new commissions that they held their offices during pleasure. And it was expressly affirmed that all manner of authority and jurisdiction, as well ecclesiastical as civil, was originally derived from the crown (*Hume*, c. xxxiv.). The Protector was appointed with full regal power, and the Protector and his council were empowered to act with and at discretion, and to execute whatever they deemed for the public service, without incurring any penalty or forfeiture from any law, statute, proclamation, or ordinance whatever (*Burnet*, vol. ii.). An act of parliament had invested the crown with a legislative power, and royal proclamations, even during a minority, were received with the force of laws. The Protector, finding himself supported by this statute, was determined to employ his authority in favor of the reformers, and having suspended, during the interval, the jurisdiction of the bishops, he ordered a general visitation to be made in all the dioceses of England (*Hume*, c. xxxiv.). The same tyranny which had been exercised in the previous reign for the prosecution of *both* religious parties was now being exercised against *one* of them; not, indeed, from mere feelings of religious bigotry, which might have in them something of honesty, but from infinitely viler motives of self-interest. Few members of the council seemed to retain any attachment to the Roman communion, and most of the councillors appeared even sanguine in forwarding the progress of the Reformation. The riches which most of them had acquired from the spoils of the clergy induced them to widen the breach between England and Rome, and render a coalition impracticable (*Ibid.*). Heresy was still a capital crime by the common law, and was subjected to the penalty of burning. It was also enacted that all who denied the king's supremacy, or asserted the pope's, should, for the first offence, forfeit their goods and chattels, and suffer imprisonment during pleasure; for the second offence, should incur the penalties of a præmunire; and for a third, be attainted of treason. But if any endeavored, by writing, printing, or any overt act, to deprive the king of his estates or titles, particularly of his supremacy, or to confer them on any other, he was to be adjudged guilty of high treason (*Ibid.*). The Protector had assented to the law which gave to the king's proclamations the authority of statutes; but he did not intend to renounce that arbitrary or discretionary exercise of power in issuing proclamations which had been assumed by the crown, and which it is difficult to distinguish exactly from a full legislative power. He even continued to exert his authority in some particulars which were then regarded as the most momentous. Orders were issued by council as to various religious observances (*Ibid.*). All the measures of the reign, with reference to religion or the church, or the religious houses, were directed to augment the royal influence or the royal revenues. The abbey lands were vested in the crown, and although, as Lord Coke states, the co-operation of the nobility and gentry was obtained by promises of the application of the funds to public purposes, these promises were never realized (*Coke*, 4 *Inst.*, fol. 44). Beside the lands possessed by the monasteries, the regular clergy enjoyed a considerable part of the benefices of England, and of the

administration of justice, and others, relating to our criminal law, which are more particularly deserving of

tithes annexed to them: these were also at this time transferred to the crown, and by that means passed into the hands of the laymen (*Ibid.*). A committee of bishops had been appointed by the council to compose a liturgy, and they had executed the work committed to them. The parliament established this form of worship in all the churches, and ordained a uniformity to be observed in all the rites and ceremonies (2 and 7 *Edw. VI.*, c. i.). This was the first Prayer-Book of Edward VI., and another was afterwards established by the same authority. The same principle of compulsion by law in religious matters, and of the supremacy of the civil power over the spiritual, will here be observed. The only alteration was, that the power, by reason of the minority of the king, was more in the hands of the council and the parliament; but the spirit and the policy were the same. The spirit was that of coercion, the policy that of absolutism of lay authority. "It appeared in that age," observes the historian, "a necessary policy to exercise severities for the sake of enforcing conformity." A commission, by act of council, was granted to the primate and others to examine and search after all heretics or contemners of the Book of Common Prayer (*Burnet*, vol. ii., p. 31; *Regmerton*, xv., p. 181). The commissioners were enjoined to reclaim them if possible, to impose penance on them, and give them absolution; or if they were obstinate, to excommunicate them, and deliver them over to the secular arm; and in the execution of this power they were not bound to observe the ordinary methods of trial; the forms of law were dispensed with, and if any statutes happened to interfere with the power in the commission, they were overruled and abrogated by the council (*Ibid.*). All the measures, therefore, which had been pursued in support of the old religion were adapted to the support of the new; and thus it was fully shown that such measures were the result rather of the spirit of the age, and especially of a tendency to tyranny, than any particular religious bigotry. Several persons, notwithstanding that our author states the contrary, were actually sent to the stake in this reign for heresy. "These rigorous methods of proceeding," says the historian, "soon brought the whole nation to a conformity, seeming or real, with the new doctrines and the new beliefs" (*Ibid.*). And this was the tyranny of lay power; for, as the historian observes, "the general humor of the age rather led men to bereave the ecclesiastics of all power, and even to pillage them of their property" (*Ibid.*, vol. ii., p. 202; *Hume*, c. xxxv.). There never was an age in which ecclesiastical power was weaker. Several other bishops were deprived of their sees on pretence of disobedience (*Ibid.*). Of course, under such a rule, any alterations made in the faith or worship of the nation were as much the result of royal tyranny (or a tyranny exercised in the name of royalty) as under Henry VIII. The Book of Common Prayer under this system of rule suffered a new revision (*Ibid.*), and this was the second Prayer-Book of Edward VI.; and at the same time articles were framed and imposed on a subservient clergy and an enslaved nation. The better to coerce the people, a most severe law was passed against riots, enacting that if any, to the number of twelve persons, should meet together for any matter of state, and being required by a lawful magistrate, should not disperse, it *should be treason* (*Ibid.*; 3 and 4 *Edw. VI.*, c. v.). It is impossible not to perceive that in this reign the system of rule which had prevailed under Henry was continued; that it was neither more nor less than a reign of terror; that clergy and laity were alike subdued and subservient and enslaved under an ascendancy of royal authority which amounted to perfect and absolute tyranny. The parliament empowered the king to appoint commissioners to compile a body of canon laws, which were

notice. Meanwhile, the activity and designs of the government were such, that these two reigns are fruitful of

to be valid, though never ratified by parliament. Such implicit trust did they repose in the crown, without reflecting that all their liberties and properties might be affected by the canons (3 and 4 *Edw. VI.*, c. ii.; *Hume*, c. xxxv.). The bishops had been compelled to take commissions in which it was declared that they held their sees during the king's pleasure only. It was resolved to deprive the prelates still favorable to the Roman communion. It was thought proper to begin with Gardiner, to strike terror into the rest. The method of proceeding against him was violent, and had scarcely any color of law or justice. He had been thrown into prison, and had been there detained ten years, without being accused of any crime except disobedience to an arbitrary command. A commission was appointed to try or, more properly speaking, to condemn him. He objected to the legality of the commission, which was not founded on any statute or commission. His appeal was disregarded, and sentence was pronounced against him. He was deprived of his bishopric, and committed to close custody (*Ibid.*). Such was the spirit in which the counsel under Edward, composed mainly of the ministers of Henry, pursued the government. It was the spirit of arbitrary power; and the legislation of the reign of Edward VI. was in its whole tone, tenor, and character thoroughly the same as that of Henry VIII., especially upon the subject of religion, even although the religion was altered. For however it was altered, it was altered by the will of the crown, and because it was the will of the crown, and for no other reason than that, in the view the crown chose to take, such and such alterations were required. Thus the same tyrannical spirit which pervaded the legislation of Henry on the subject equally pervaded that of Edward; and it was the spirit of the dynasty—the spirit of absolute authority of royalty. This is remarkably manifest in the force and language of the first statutes of the reign, which are on the subject of religion, and breathe the spirit of Henry while denouncing his favorite dogma, and moreover breathe the same spirit of servile subserviency and slavish sycophancy which characterized the language of parliament throughout the whole period of the dynasty. The statute begins thus: “The king's most excellent majesty, minding the governance and order of his subjects to be in most perfect unity and concord, and especially in the true faith and religion” (*i. e.*, what the crown chose to consider so), “and wishing the same to be brought to pass with all clemency and mercy on his highness' part towards them, as his most princely serenity and majesty hath already declared,” etc. And then the statute proceeds to impose on the people the king's notion of the sacrament, and to make it penal to attack it. What was this but in principle to follow the infamous policy of the act of the six articles, in which a monarch first dared to dictate dogmas to his subjects? So by a subsequent statute it was declared, that if any person, by express words or saying, should affirm that the king is or ought not to be supreme head on earth of the Church of England or Ireland, immediately under God, or that the Bishop of Rome, or any other person other than the king of England, is or ought to be supreme head of those churches, then every such offender should, for the first offence, forfeit everything, and suffer imprisonment at the king's pleasure; for the second offence, *suffer perpetual imprisonment*; and for a third offence (*i. e.*, in prison), should be adjudged a *high traitor, and suffer pains of death* (1 *Edw. VI.*, c. xii., s. 6). Such was the sanguinary penalty denounced, even in a statute professedly moderate, and passed to mitigate the laws against religion. It repealed the laws of Henry against Protestant opinions, and simply re-enacted them against Roman Catholic opinions. Their form and direction were altered; their spirit was

interesting facts regarding the practice and execution of our penal laws.

the same. The sword of persecution was held as sternly over the adherents of the old opinions, under Henry, as it had been directed against the professors of the new; and so, under Mary, the sword was turned again against Protestants, and under Elizabeth, once more against Catholics. The spirit of the age and of the dynasty was one of persecution, and it pervaded the laws upon the subject of religion, whatever might be the religion which prevailed. For the principle was, that every man was bound to profess the religion of the sovereign, and that the sovereign had a right to persecute any who ventured to oppose it. So, again, as to the election of bishops, the same arbitrary spirit was shown. The act recites that the elections of bishops and archbishops by deans and chapters be too long delayed, and that the elections be in very deed no elections, but only by a writ of *conge d'élire* have colors, shadows, or pretences of elections, seeming to no purpose, and seeming also derogatory and prejudicial to the king's prerogative, to whom only appertaineth the collation and gift of all archbishoprics and bishoprics, and then it enacted that the crown should collate to all bishoprics (1 *Edw. VI.*, c. ii.). This was repealed by 1 Elizabeth, c. i., which revived 25 Henry VIII., c. xx., giving the form of election. It may be that it was but a form, a color, and a sham; but in the open assertion that it was so, there was an insolence of arbitrary power which even Henry had abstained from, and Elizabeth deemed it politic to avoid. Nothing can more strongly show the character and spirit of this reign. So the Act of Uniformity, establishing what is called the first Prayer-Book of Edward VI.: it assumes the power of the crown to dictate the religion of its subjects, and takes credit for moderation and forbearance to the extent to which the power is not exercised, and they are not persecuted for resisting it. "The king's majesty, with the advice of his council, hath essayed to stay innovations, yet the same hath not had such good success as his highness required, whereupon, being pleased to bear with the frailty and weakness of his subjects, of his great clemency, hath been content to abstain from punishing those that have offended," etc.; and then it proceeds to enact the observance of the Prayer-Book for the celebration of the Lord's Supper, commonly called the mass, a term evidently derived from the old French word *messe*. The prayer-book thus established was, of course, in accordance with the previous statute, which established the Protestant doctrine on the subject, and was necessarily inconsistent with the Catholic doctrine of the mass. And the act for abolition of chantries, passed in that year, had carried out the act of Henry VIII. for that purpose (which was limited to the duration of his life), by enacting that all chantries, colleges, and free chapels, and all lands and rents appointed or intended to the finding of any priest, to have continuance forever, should be forfeited. This, coupled with the recital of the act of Henry, clearly pointed to endowments or gifts for the purpose of securing the celebration of divine services for the souls of the donors or founders, for the former statute clearly was so intended and understood. It must be manifest that it could never have been intended by the act of Henry to abolish endowments for the maintenance of the Catholic worship, which he remained attached to, and every mass was by its terms a mass for the dead as well as for the living, being offered *pro vivis et defunctis*; and the only distinction of a mass for the dead, as it was called, being that it was offered mainly for them. It never, therefore, could have been intended that the statute of Henry should be applied to the abolition of endowments for the maintenance of the Catholic worship, or even of masses generally for the dead. The class of endowments aimed at were what were called chantries, or those *in ejusdem generis*, i. e., endowments

The attack made on the hierarchy, in the reign of Henry, by taking away the authority of the pope over

for masses for the souls of the founders or donors, the benefit of which was supposed to be received by being thus bargained for. This was what the former statute was aimed at, and it should seem that it was what the act of Edward VI. was aimed at, which, it is to be observed, only applied to cases where the funds were appointed for the finding of the priest, *i. e.*, where that was the sole object or the great object. It did not apply to cases of endowments for support of divine service, or for other purposes, even although there might be a direction to pray for the souls of the donors or founders. Otherwise the endowments of the colleges, cathedrals, and collegiate schools would have been destroyed. There was, indeed, a clause expressly providing that the act should not extend to any college, house, or hall within the universities, nor to St. George's Chapel, nor St. Mary's, Winchester, nor to Eaton College, nor any cathedral church, except as to any obits or chantries therein (1 *Edw. VI.*, c. xiv., s. 19); but that clause, as the last sentence of it clearly shows, distinguishing as it does the university colleges from the chantries, was either miscited *ex abundante cautela*, or with reference to some of the inquisitorial powers of the act. For all the cases on the statute show that no endowments for the celebration of divine service or otherwise were within the statute as superstitions, unless where the object was to find priests to celebrate masses, or offer prayers for the souls of the donors or founders. The distinction had been always, as has been seen in previous volumes, drawn in the Year-Books between endowments for the support of divine worship and for the support of obits, or prayers or services for particular souls, and the latter were always regarded with disfavor, and this even in the age before the Reformation, when divine service was the mass, and the mass was always for the living and the dead. Hence under this act, as under the former, it was held that it only applied to obits, or endowments for the benefit of particular souls, and hence upon this principle it was held, in the reign of James I., that the words used did not extend to endowments for the support of divine service, but only to such as were for services for the soul of the donor (*Pit's Case*, *Hobart's Reps.*, 123). And on the same principle, it was said that chapels of ease, colleges of universities, and cathedrals, even though not excepted, would have been out of the statute, for that they were not erected with that object (*Ibid.*). This subject has considerable interest in more respects than one; and the view here presented is supported by a decision in our own time, to the effect that even under the second Prayer-Book of Edward VI. (or one in substance the same) there was nothing in prayers for the dead contrary to the doctrines of the Church of England; and it follows that there would be nothing illegal in an endowment for such prayers, that is, for the souls of the faithful generally; but endowments for prayers for the souls of particular persons — the donors or founders — as they were always regarded as different from endowments for divine service generally, so would be within the scope and purview of this act. So the same spirit pervaded the act which established the second Prayer-Book of Edward VI. (5 and 6 *Edw. VI.*, c. 1). That recited that a great number of people did wilfully and damnably abstain and refuse to come to their parish churches, for reformation of which they were to be compelled to do so; and it was declared that the king's most excellent majesty had caused the Book of Common Prayer to be made fully perfect, and that it was to be revised, used, and esteemed in like manner as the other had been under the act for uniformity of worship. And the penalties for being present at any other form of worship were, for the first and second offences, imprisonment, and for the third, imprisonment for life. The same spirit pervaded the statute by which

persons and causes of a spiritual nature, prepared the way for a complete reformation. When the system of papal sub-

a person declaring the king to be a heretic or schismatic might be liable to perpetual imprisonment. The whole character of legislation in that age, however, was severe and sanguinary. Thus striking in a churchyard was punishable by cutting off the ears and branding the cheeks (5 and 6 *Edw. VI.*, c. 4). The legislation of this brief but important reign on the first and most important subject, that of religion, cannot be better sketched than in the clear and lucid language of the eminent historian to whom we have already been so indebted, Sir James Mackintosh: "The government, almost entirely Protestant, proceeded to the grand object of completing the religious revolution, and of establishing a church not only independent of the discipline of the see of Rome, but dissenting from many doctrines which had been for ages held sacred by the whole western church. The Protector began his task through the ancient prerogative of the crown, through the supremacy over the church, and by means of the statute which gave to proclamations the authority of law" (*Hist. England*, v. i., c. ix.). A parliament was assembled in 1547, in which several bills were passed to promote and enlarge the Reformation. The communion was appointed to be received in both kinds by the laity in a statute (1 *Edw. V.*, c. i.), drawn with address, which professes to be passed for the purpose of preventing irreverence towards the sacrament. Bishops were to be formally nominated by the king, and process in the ecclesiastical courts was to run in the king's name (1 *Edw. VI.*, c. 2). In another act, the statutes of Henry IV. against the Lollards were repealed, together with all the acts in matters of religion passed under Henry VIII., except those directed against the papal supremacy (1 *Edw. VI.*, c. 12). All the treasons created by Henry underwent the same fate; and that offence was restored to the simplicity of the statute of Edward III. The act which gave legislative power to proclamations was also abrogated by the last-mentioned statute. In the next session the uniformity of public worship was established, in which all ministers were enjoined to use only the Book of Common Prayer (2 *Edw. VI.*, c. i.), the foundation of that which, after various alterations in the reigns of Elizabeth, James I., and Charles II., continues in use to this day (*Ibid.*). This act, it is to be observed, has lately been the subject of judicial decision in the Privy Council; and it has been solemnly affirmed, that no ornaments are legally allowable in the Church of England not expressly authorized in this Prayer-Book, thus established by statute; and, on the other hand, that no ceremonies are allowable save those preserved by the subsequent act. The historian observes, "That though there were no Protestant nonconformists at this period, yet the last act of uniformity passed in this reign may be considered as the earliest instance of penal legislation pointed against dissenters (5 and 6 *Edw. VI.*, c. i.); and commanded all persons to attend public worship under pain of six months' imprisonment for the first offence, twelve for the second, and, for the third, confinement for life" (*Ibid.*). It is not to be wondered at, that, under the pressure of such tyrannical laws, it was, as the historian says, "deemed necessary, before its close, to pass a riot act of great severity against tumultuous assemblies" (*Ibid.*). This act, renewed in the reign of Mary, was the original of the Riot Act of George I., which is still in force. The enlightened historian is led to make some remarks upon the penal legislation of the reign as to religion; and these remarks are quoted as illustrative of the spirit in which the history of laws should be considered: that is to say, considering them in the light of the ideas which prevailed at the time, or in the age when they were enacted. The policy adopted in the reign of Edward respecting dissent from the established church deserves some consideration.

ordination was once broken, a new regulation in doctrine and worship might be accomplished with less obstruction and difficulty. This was the work of Edward VI.'s reign.

The toleration of heresy was deemed by men of all persuasions to be as unreasonable as it would now be thought to propose the impunity of murder. The open exercise of any worship except that established by law was considered as a mutinous disregard of lawful authority, in which perseverance was accounted a very culpable contumacy (*Ibid.*). Probably if the historian had mentioned the dreadful statute passed in this reign, as Burnet says, against the vagrant monks, he would have thought it necessary to make the same apology for it. The next statute, 1 Edward VI., c. xiii., reciting that "the multitude of people given to idleness and vagabondery was more in number in this realm than any other reign," enacted, "that any runagate servant, or any other that lived idly and loiteringly, by the space of three days, being brought before two justices, was to be marked with a hot iron on the breast with the mark of V; and should be adjudged a slave for two years to the person who brought him: to be fed on bread, water, and small drink, and refuse meat; and to be made work by beating, chaining, or otherwise, be the work in labor ever so vile." If such slave absented himself for fourteen days during that term, he was to be marked on the forehead, or ball of the cheek, with a hot iron, with the sign of an S; and further, to be adjudged a slave forever. And if he ran away a second time, to be adjudged a felon, and to be executed. The latter part of this act, which made vagabonds slaves, was indeed repealed by the statute 3 and 4 Edward VI., c. xi., by which, however, the statute 22 Henry VIII., c. xii., was revived: which had been directed against the religious orders, and enacted, that any person begging without a license was to be whipped; and that any able-bodied person who was taken vagrant and begging, and could give no account how he got his living, might be "whipped till his body was bloody;" and, as often as he violated the act, he was to be whipped, until he betook himself to labor. And Burnet says, this was directed against the vagrant monks (*Hist.*). Such were the laws of this reign, which, it will be seen, were not at all in advance of the spirit of the age, as described by Sir J. Mackintosh. Moreover, although he says that no persons suffered death for religion in this reign, in that he was strangely in error, for, as our author observes, several Anabaptists suffered death, and if others did not, it was, it is evident, not for want of laws to warrant, but rather from the shortness of the reign. Probably, in so short a time, never were so many or so dreadful penal laws passed as in this brief reign; in that respect, as regards the character of the laws passed, even worse than that of Henry VIII., considering its comparative shortness. And this feature of the reign is enhanced upon the more probable construction of the *Reformatu Legum Ecclesiasticorum*, according to which death was determined as the penalty of heresy. It happened that the king did not live to sanction it, or, by virtue of the statutes as to the supremacy, it would have been enforced as law. But it remains a memorial of the policy of the reign—entirely in harmony with the statutes which were passed. "The book," says Sir J. Mackintosh, "not having received the royal confirmation, is not indeed law; but it is of great authority" (*Hist. Eng.*, vol. ii., c. ix.). It is enough, however, to refer to the statutes actually passed in this reign on the subject of religion, to show that they only illustrate the remarks of the historian as to the general character and spirit of the age. The reign was, however, distinguished by various other statutes of considerable importance; and, on the whole, has a marked and distinctive character, as an era in our legal history which demands for it separate and distinct consideration.

Great part of the nation were disposed to an alteration in the established form of religion, from a conviction of its vanities and foppery. Those who still adhered to the old superstition, saw themselves without the sanction they once derived from the holy see, and the privileges of churchmen. The clergy, now reduced under subordination to the king as supreme head, had sunk into the condition of their fellow-subjects. In this state of things there was less danger to be apprehended from opposition to any reformation that might be attempted.

The first act of the legislature was intended for the abolition of the mass, with all its numberless abuses and superstitions, which was to be done The Reformation established. by restoring the communion to its primitive institution. This was by stat. 1 Edward VI., c. 1, which contains a long and accurate preamble concerning the appointment of this sacrament by Christ; stating, that it is "called in Scripture a supper, the table of the Lord, the communion and partaking of the body and blood of Christ; but that many persons had condemned in their hearts the whole thing, on account of certain abuses heretofore committed in the misapplication of it." For these reasons it was enacted, in the first place, that whosoever shall deprave, despise, or contemn the sacrament, by contemptuous words or otherwise, shall suffer imprisonment and make fine at the king's pleasure; the offence is to be inquired of, by the oaths of twelve men at the quarter-sessions; the indictment to be brought in three months after the offence; and a writ is to be directed to the bishop of the diocese to attend in person or by deputy, at the sessions.

But the principal object of the act was to restore the communion in both kinds, which, the preamble says, "was more agreeable both to the first institution of the sacrament of the body and blood of Christ, and also more conformable to the common use and practice of the apostles, and of the primitive church for five hundred years and more after Christ; and further, that it was more agreeable to the first institution, and the usage of the primitive church, that the people being present should receive the same with the priest, than that the priest should receive it alone." It is therefore enacted, that the sacrament shall be administered to the people within the Church of England and Ireland, and other the king's

dominions, under both kinds; and the minister shall not, without lawful cause, deny the same to any person (a). However, there is no enacting clause concerning the priest not taking it alone, nor are there any penalties annexed.

The next statute made by the parliament was stat. 1 Edward VI., c. 2, and this had the Reformation in view. Having stated that elections of bishops by *congé d'élire* were mere shadows of elections, and attended with great delay and expense, and that they seemed derogatory and prejudicial to the king's prerogative, it provides that they shall in future be appointed by the king's letters-patent. All process was to be in the king's name, but the *teste* in that of the bishop, except the Archbishop of Canterbury, who might use his own seal.

Then follows stat. 1 Edward VI., c. 12, which repeals¹ stat. 5 Richard II., stat. 2, c. 5, and stat. 2 Henry V., c. 7, that had been made against Lollards, and had been put in execution in the last reign; besides these, it repeals stat. 25 Henry VIII., c. 14, concerning the punishment of heretics and Lollards; the statute of the six articles,

(a) In the early part of the reign of Charles II., an action on the case was brought against a person, for that the sacrament of the Lord's Supper was to be administered to the parishioners such a Sunday, and the defendant, though requested to admit the plaintiff, refused. So of another Sunday, *contra formam statuti*. And the jury found for the plaintiff, and assessed damages, and it was moved in arrest of judgment:—1. For that no action lay in the temporal courts, for that it was merely spiritual and punishable (in the ecclesiastical courts) by censure. And he cannot be so punished in the spiritual court by demanding damages, for it is a spiritual loss. And that laymen could not judge of the value of spiritual good. 2. Admitting that the action would lie, for the same reason every parishioner could sue as well as the plaintiff. 3. It was objected that the statute on which the action was founded must be presumed to be the 1 Edward VI., c. i., which command that the sacrament of the body and blood of our Saviour by bread and wine, *sub utraque specie*, should be administered, and does not say the sacrament of the Lord's Supper, as the plaintiff had declared, which was a new expression used in the statute of the 1 Elizabeth. 4. Further, that he had not declared that he was a parishioner, and that the person had notice; for by the canons which had been published by authority (1 James I., *Can.* 21, 22, 27), it would be an offence to administer the communion to a person not a parishioner. The court avoided determining all the more material and important points, and gave judgment for the defendant on a point extremely technical, viz., that it had not been alleged that there was a request on the second occasion, and that entire damages had been given. But the court did not deliver any opinion (says the reporter) as to the trying of the action (*Clovell v. Cardinal, Siderfin*, 34).

¹ Sect. 2.

31 Henry VIII., c. 14; stat. 34 and 35 Henry VIII., c. 1, concerning the books of the Old and New Testament in English, the printing, reading, having, or selling them; and also stat. 35 Henry VIII., c. 5, which qualifies the statutes of the six articles. All these statutes in particular, and every other act of parliament concerning doctrine and matters of religion, were thereby repealed and made void. By the same act, there are penalties inflicted on those who deny the king's supremacy, or affirm that the bishop of Rome,¹ or any other person, is, or ought to be, by the laws of God, supreme head of the Church of England and Ireland.

The last remains of superstitious establishments were destroyed by stat. 1 Edward VI., c. 14, which gave to the king all chantries, colleges, and free chapels (a); all lands

(a) This statute was in continuation of the act of Henry (which was only in force during his life), and that was directed, not at endowments for masses, nor even masses for the dead, for the mass remained the established worship during the whole of his reign, and it was always offered for the living and the dead (*pro vivis et defunctis*), but against the chantries or obits, as they were called, which (as described in the previous volume) were endowments for prayers or masses to be offered for the souls of the donors or founders. There were different endowments of this kind: some were called colleges, in which the endowment was for the support of a number of priests or bedesmen to offer such masses or prayers; but the essence of all of them was, that the object of the endowment was to secure a particular spiritual benefit for the souls of the donors or some particular persons. And the scope of this statute, as all the cases upon it show, was the same; and it was only directed against such endowments. It was never held that endowments for the support of divine service, even though that service was the mass, was within the statute. Thus, in one of the numerous cases on the statute, it was said that the statute made an express difference between land given for the maintenance of an obit, and land given for the maintenance of a priest or of divine service, and it was only the former which was forfeited (*Hart v. Brewer, Cro. Eliz.*, 449). Otherwise, it was said, all the church land in England would be forfeited; and if land was given to a priest, *quatenus* a parish priest, to chant mass (*i. e.*, generally) it was not forfeited, but only if it was to say mass for the soul of the donor or other particular person (*Adams v. Lambert, 4 Coke*, 113). All the cases are to the like effect. Where one devised money to a dean and chapter to the intent to find a chantry in their church perpetually, and an obit for the soul of the donor, and that the chantry priest should have forty marks yearly, and the money was paid, and the king's license given to purchase land for the use, which they did, and made ordinances for the settling of the service, and laid out money yearly for the maintenance of a priest and an obit, it was held that this was not a chantry, for no lands were given by the founder, and the dean and chapter appointed no lands to a chantry, but only bound themselves to pay money to the priest for the obit; and in cases where no lands were given to such superstitious purposes, there would be, it was said, no forfeiture

¹ Sect. 6.

given for the finding of a priest forever, or for the maintenance of any anniversary, *obit*, light or lamp in any

(*Holloway v. Watkins*, *Cro. Jac.*, 51). In all the cases under the statute, the essence of the use was the stipulation for prayers for the souls of particular persons. Thus, in are of the earliest, lands were given to find an obit in such a chapel (appointing a certain sum for it), and that the residue should be employed for the reparation of the chapel in which the obit should be celebrated; it was adjudged that as the land was given, the land was forfeited, an obit being a service for the soul of a particular person (*Whetstone's Case*, *Duke*, 89). So where, in the reign of Edward IV., lands were given to find a priest to say divine service for the souls of certain persons, it was adjudged that the lands were forfeited, as the uses were superstitious (*Colborn v. Dale*, 4 *Coke*, 116). So where a man devised land to find a priest (*i. e.*, to say prayers for his soul), it was held superstitious (*Adams v. Stakes*, 4 *Coke*, 166). So in another case where the gift was for a priest to pray for the souls of certain persons (*Tate's Case*, 4 *Coke*, 113). So where, in the reign of Henry VII., a gift was to the intent that the feoffees should take the profits and therewith find a priest to say mass for the souls of the donor and his friends, for a certain term of years, and at the end of the term sell the lands, and with the money find a priest to chant for the souls; and the priest had been found from the time of Henry VII. until the time of the statute, and the lands were seized by Queen Elizabeth under the statute (*Wilkhams v. Wood*, *Duke*, 93). And, it is to be observed, that unless the lands were given with the object of finding a priest for the specific purpose of offering divine services for the souls of the donors, the gift would not be void, although there might be a direction to pray for the donor; for otherwise, all the colleges at Oxford or Cambridge would be confiscated, as the statutes all require that the founders should be prayed for. The statute only applied if the object was to find the priest. In the 11th year of Henry VI., a gift was made to the intent to find a chaplain *ad divina celebranda*, until the feoffor, or his heirs, should procure a foundation, and there was no employment, until the 3d year of Edward VI.; and therefore, in the time of Queen Elizabeth, one purchased the land as a concealment. Afterwards commissioners of charitable uses decreed the land away from him; but the decree was set aside by the Lord Chancellor, because the use, limited to find a chaplain *ad divina celebranda*, was no use within the statute; but the chancellor decreed the land to the first use; for a gift *quidam capellano, ad divina celebranda* in a certain church or chapel, is no superstitious use within the statute 1 Edward VI.; and so was the opinion of the judges; and the reason was, *because that is the general case of all parsons in England*; and the commissioners of the use, where only for a chaplain, might decree it to a preacher (*Duke's Charitable Uses*, 154). Thus, in the reign of James I., it was held, that if a charitable use could be separated from the superstitious, it should be held good. And so it was held that if there was a limitation of lands, rents, etc., to keep and maintain an obit or anniversary for the souls of such and such persons, and all Christian souls, or the like, and that so much out of the land shall be spent yearly about it, but all the rest of the profits shall go to the repair of the highways, or such like uses, this is a good, charitable use for all the overplus (*Adams v. Lambert*, 4 *Coke*, 104). And in a learned work already cited upon charitable uses, the substance of the cases upon this subject is thus stated: "If lands, rents, or manors, etc., are assigned, to have continuance forever, or for a time only, towards or for the maintenance of a stipendiary priest, or for the maintenance of an anniversary or obit, or of any light or lamp in any church or chapel, or any like intent, these, and such like gifts and dispositions as these, are not to be accounted charitable

church or chapel, or the like; all fraternities, brotherhoods, and guilds (except those for mysteries and crafts),

uses, but superstitious uses within the province of this statute; and what is disposed and settled in any such course is forfeited and given to the king. And therefore, if any time heretofore any such thing hath been given, or shall hereafter be given, by any man at his last will, at his death, or by act executed in his life-time, to any person, sole or corporate, for life or year, to the intent or upon condition to find a chaplain, and have the service of a priest to say mass, or to have a priest or other man to pray for the soul of any dead man in such a church or other place, or to have or maintain perpetual obits, etc., to be used at certain times, to help to save the souls of men out of the supposed purgatory, these and such like uses are not charitable, but are looked upon and accounted in law as *superstitious* uses; and therefore all these, and such like uses, are void, and the lands so given to such superstitious uses are, by other statutes, given to the king; yet so, if there be any charitable use intermixed with the superstitious use, and that can be distinguished, then the king shall have only so much as is given to the superstitious use, and not that which is given to the charitable use also" (*Adams and Lambert's Case*, 4 Coke, 104; *Holloway v. Watkins*, 2 Cro. Jac., 51). Thus, if £20 a year were given, to find a priest with £10 of it, and that the rest should be for the poor, the king should only have the £10; but if it were for finding of a priest and maintenance of poor men, without saying how much the priest should have, the king should have all (*Duke's Charitable Uses*, 59). If land of £20 a year be given for finding a salary, for a priest £10 of it, and there is also another good use limited with it, there the king will have but £10, although the other necessities are to be found for the priest, for a good use uncertain shall be preferred before a superstitious uncertain use; but if nothing uncertain be limited to the priest, all the land will go the king. If land be given to find a priest, the king will have it; but if a priest have but a stipend out of the land, the king shall have but the stipend. When a certain sum is limited to a priest, and other good uses are also limited which depend upon the superstitious use, all in this case is given to the king. If all the uses be superstitious, of what certainty soever they are, the whole land is given to the king; otherwise it is if there be any good use (*Ibid.*). The learned author added, that "prayer for the dead, out of as well as in a church or chapel, may make the use superstitious" (*Ibid.*). But this is decidedly erroneous, unless it is to be understood (as perhaps it is) of such prayers for the dead as were within the scope of the statute, *i. e.*, prayers or divine services specially bargained for, so to speak, by the terms of the gift, for the benefit of the souls of the donors or of particular persons designated by him. There is nothing in the statute, nor in its scope, its provision, or its spirit, against gifts or endowments for the souls of the dead generally. This can be shown conclusively thus: that at the time the former statute on the subject passed, the mass was still the established worship of the country, and every mass is a mass for the dead, as it is expressly offered *pro vivis et defunctis*; and the only difference between an ordinary mass and one for the dead is, that in the latter, the mass is directed to the benefit of the souls of the dead, the other generally or particularly by virtue of the particular intention of the celebrant. And such masses for the dead continued to be offered, and are provided for by Henry's will. It is impossible, therefore, that masses for the dead generally could be deemed to be within these statutes; and the same thing is probable in another way. For in our own time, and upon the second Prayer-Book of Edward VI., or one substantially the same, it has been held that there is nothing even in the rules or formularies of the Church of England against prayers for the dead. This being so, it is mani-

with all their lands and possessions. There are several exceptions in this act which have saved some of the least

fest that it could not be that gifts merely for prayers or masses for the dead generally could be deemed illegal within the scope of the statute. It must have been the bargaining for the benefit of such masses for the souls of the donors, and the notion that by such bargaining the benefit could be obtained, which made the gifts "superstitious" within the meaning of the statute. It was not until a considerable time after this statute that the mass was proscribed and its celebration rendered illegal; and as this statute confiscated existing endowments which had been made under the same form of the law, it was, as regards those, penal in its nature, and not to be extended by construction, and it has been seen it was not extended to confiscate existing endowments merely for the maintenance of the mass. The learned Lingard observes upon this act: "Our lawyers teach that by the statute passed on this occasion lands and goods subsequently given to superstitious uses are forfeited to the king; yet the operation of the statute is expressly limited to lands and goods belonging to colleges and chantries which existed within the last five years, or given for anniversaries and obits kept or maintained within the five years next before the said first day of the parliament (*Stat. of Realm*, c. iv., 25, 26). There is nothing in the act to make it forfeiture" (*Lingard's Hist. Eng.*, vol. v., c. iv.). That is so, no doubt, so far as regards the terms of the statute, and as a general rule or principle a penal law is never extended beyond its express terms; and the passing of the second statute is itself an instance of it, for but for that principle the former act might as well have been extended by construction to include all such endowments as came within the scope of its object, which no doubt was the suppression of all such endowments, yet a second statute was deemed necessary to confiscate all which had not been confiscated under the first. But the reason for the second statute was, that the first was expressly limited to take effect only during the late king's life; and the reason for the extension of the operation of the second act backwards for five years was, that ordinarily a statute, especially if penal, is prospective; and as there had been an act in force down to the end of the late king's reign, it was probably thought that, but for an express provision for a retrospective operation of the second statute, it would not be so construed. As regards its having, however, been construed ever after as rendering illegal all subsequent endowments of the same nature, it is to be observed that it had escaped the attention of the learned historian, that as regards such endowments, they were probably, on more grounds than one, and certainly on one, entirely illegal. In the most usual class of cases, when the endowments were out of land, they would be clearly contrary to the statutes of mortmain. The old endowments, as already has been shown in a former volume, required the license of the crown to make them legal; and without such licenses (which, of course, were no longer obtainable), they were clearly illegal. And even when the endowments were not out of land, they would probably be contrary to public policy, extending to perpetuity; and also upon another ground, that they were in the nature of pecuniary bargains or conditions for a personal spiritual benefit, which, to say the least, would savor strongly of simony, and lead to great danger of abuse. For the essence of these endowments was, as has been seen, that the masses should be offered for the benefit of the souls of the donors, so that in effect the donors secured money in perpetuity for spiritual benefits to themselves. And the canon law, in this respect, followed by the common law, considered the payment of money for the procuring of a spiritual benefit as simony, unless when custom sanctioned some small and necessary payment; and hence the canon law had always based the lawfulness of these payments for

objectionable of these institutions (stripped, however, of their superstitions), and such as were only included in

masses on the necessity of their *pro sustentatione*; whence it would follow that, beyond what was thus necessary, they would not be lawful. And on the same principle, payments for sacraments, as baptism or matrimony, were only sanctioned, either by common law or canon law, to the extent to which custom had allowed them, which was always to some such small amount as would preclude the possibility of a corrupt motive in the administration of the sacrament. It is obvious that to the extent to which these endowments went beyond such limit, they would, to say the least, be in danger of the mischief of simony, and even when they did not exceed that limit they would be still open to serious objection on another ground of public policy, which is often suggested in the cases on the subject in the Year-Books, viz., that they tended to keep up a distinct order or class of priests without parochial duties, and without any duties at all beyond the daily duty of offering the stipulated masses, and who therefore would be in great danger of idleness and its attendant vices. That this act had been observed in Catholic times, and during the whole period of the existence of these endowments, is manifest from the contemptuous course often adopted towards the chantry priests, of attempting to prosecute them under the statute of laborers, and the sarcastic tone in which this attempt was answered by the observation that they were not like the parochial clergy, who really had work to do, as in visiting the sick, instructing their flocks, and the like (*Year-Book*, 50 *Edw. III.*, fol. 13). And it is probable that few things had more tended to bring the old religion into disrepute than the abuses of these endowments and their tendency to foster an idle, corrupt, and dissolute order of priests, who had a constant pecuniary temptation to offer divine services from sordid motives, and whose conduct and character, thus debased and degraded, would tend to cast odium upon the ancient faith and worship. Thus, therefore, there were reasons of public policy for regarding these endowments as illegal for the future, independent of any statute, though of course recognized and confirmed by a statute which abolished all such endowments as then existed. And although, as regarded such endowments as existed, and had been erected with the license of the crown and under the sanction of the letter of the law, it would be necessary to have a statute expressly to confiscate them, and such statute would have the character of a penal law, it would not be so of future endowments of the same character; and therefore the courts have ever since this statute held such endowments illegal. It would, however, be a great error to suppose that this statute rendered endowments for masses illegal, for that was only the Catholic worship, which remained legal until after this statute. And although it may sometimes have been supposed that it was this statute which rendered endowments for masses illegal, that was a complete mistake; and the illegality must be ascribed either to the subsequent statutes proscribing the mass and making the celebration of it penal, or to the fact that endowments for masses were almost always associated with some express or implied stipulation for the personal benefit of the donors. It was this sort of bargain, condition, or stipulation which formed the mischief or art of these endowments, and it must be carefully kept in mind that the statute was not directed against endowments for the support of the Catholic worship, that is, the mass, but only against endowments for the offering of masses for the souls of the donors or other particular persons for whose sake the benefit was bargained or stipulated for. In the reign of Elizabeth a case arose in which it was said that the intent of the statute was not to give to the crown all land given for maintenance of persons appointed to pray for souls, for if so, then all the lands of parsons, of churches, deans, and chapters, and such like, should

the expressions of the act, but not in its design, as the universities and colleges for learning and piety.

This is followed by stat. 2 and 3 Edward VI., c. 1, for the uniformity of service, and administration of the sacraments. This act states that there had been for a long time divers forms of common prayer, as the use of Sarum, of York, of Bangor, and of Lincoln; and besides these, many more forms had of late been used, as well in morning and evening prayer as in the communion, commonly called the mass; that the king had endeavored in vain to prevent other innovations of this kind (*a*), and therefore had ap-

be given to the crown, which never had been admitted by the judges who had expounded the statute from the time of its making. And the reason was because the principal purpose of the gifts to such persons was their proper support, and not the superstitious use, although they should be desired to offer prayers for the souls of the dead, as was esteemed the charitable course in that age. Therefore it was said, where the land was given merely with a declaration that a certain portion of the profits should be given for the superstitious use, only that portion should go to the crown, and not the rest, nor the land (*Case of the Skinners' Company, Moore's Reps.*, 130). It was held in the case of the college of Maidstone that it was to be taken to have been given to the crown by the act of Edward VI., and not by that of Henry VIII., as the later statute governed it.

(*a*) The first step taken was by issuing injunctions under the royal authority (*Wilkins*, iv., 11, 14; 17 *Collier*, 11) regarding matter of religious doctrine and worship, which were enforced by a royal visitation by royal commissioners. It should seem that, under the statutes of Henry VIII., establishing the royal supremacy, this was legal, and therefore that the injunctions had a lawful and binding force and authority by virtue of those statutes; for to establish the royal supremacy, and yet not sanction its exercise, would indeed have been idle. And it should seem that this supremacy exists in its fullest sense and to the fullest extent, except so far as it may be restrained by any subsequent statutes, as, for instance, those establishing the Prayer-Books. The theory on which these injunctions were issued was clearly that the royal supremacy gave the sovereign an authority in spiritual matters paramount to that of the bishop; for when the commissioners arrived in a diocese, the exercise of spiritual authority by any other person ceased. Hitherto it had been deemed that the rites and ceremonies of the church were matters entirely for ecclesiastical cognizance and control. "The power of the Privy Council," says Bishop Burnet, "had been much exalted in King Henry's time by act of parliament, and one proviso in it was, that the king's council should have the same authority when he was under age that he himself had at full age. So it was resolved to begin with a general visitation of all England, which was divided into six districts; and two gentlemen, a civilian or divine, and a register, were appointed for every one of them; but before they were sent out, there was a letter written to all the bishops, giving them notice of it, and suspending their jurisdiction while it lasted. . . . In this new direction order was given to repeat the king's title of supreme head" (*Burnet's History of Reformation*, vol. i., book 2). So it is plain that the issuing of these injunctions was considered an exercise of the royal supremacy, and is therefore of great interest, as the first direct exercise of it in the alteration and regulation of worship. Nor can there be any doubt

pointed the Archbishop of Canterbury and other bishops to draw one convenient and meet order of prayer and administration of the sacraments, to be used all over England and Wales, which they had now performed in a book entitled "The Book of the Common Prayer and Administration of the Sacraments, and other Rites and Ceremonies of the Church, after the Use of the Church of England" (a);

that, but for the subsequent statutes establishing a certain order of prayer and worship in the Church of England, it would be in the power of the crown, in the exercise of its supremacy under the statutes of Henry VIII., to direct any alterations therein. The frequent exercise of this authority in commanding forms of prayer to be used in churches on particular occasions is a proof of this, the statutes only applying to ordinary worship; and the royal authority remaining supreme in any cases not restrained by the statutes. On the other hand, the present and the subsequent Prayer-Books, both being by authority of parliament, could supersede any ordinances established merely by royal authority, as the injunctions issued in the 1 Edward VI., already alluded to. On the same principle, the second of these acts, coupled with those of Elizabeth and Charles II., clearly supersede the former in anything inconsistent therewith. This has been repeatedly affirmed by the judicial committee of the Privy Council in the many cases which have arisen on the subject (*Westerton v. Liddell, Moore*, 176-184; and *Parker v. Leach*, 2 *Moore, N. S.*, 199). The lordships were clearly of opinion that the injunction in question, so far as it could be taken to authorize the use of lights as a ceremony or ceremonial act, was abrogated or repealed by the act 1 Elizabeth, c. ii., particularly by section 27, and by the present Prayer-Book and act of uniformity, and that the use of lighted candles, viewed as a ceremony, or ceremonial act, can derive no warrant from that injunction (*Martin v. Maconochie, coram Privy Council*, 1868-9). The statutes on this subject are, it was held in that case, decisive and conclusive in all questions of worship or faith, and nothing can be regarded as of authority but what is recognized or prescribed by the statutes. The subsequent acts of Elizabeth and Charles are based upon the present.

(a) This was the act of 2 and 3 Edward VI., it giving parliamentary authority to the first Prayer-Book of Edward VI., the title of which, it will be observed, included "ceremonies," as well as "forms of prayer or rites," so that the act seems to have applied that parliamentary authority to the rubric, or directions as to ceremonies, not less than to the prayers. This Prayer-Book was indeed superseded by one established under the same authority by the act 5 and 6 Edward VI., and called the Second Prayer-Book of Edward VI. But then the present act remained of importance; because, by the rubric in that second act, it was provided that such ornaments of the church and of the ministers thereof, at all times of their ministrations, shall be retained to be in use as were in the Church of England by the authority of parliament in the second year of Edward VI., which has lately been construed on the highest authority to mean the statute 2 and 3 Edward VI., above mentioned. As regarded other matters, indeed, that is, forms and ceremonies, the second Prayer-Book would be the governing authority. And it is not immaterial to observe, that whereas in the first Prayer-Book of King Edward VI. there was contained at the end a rubric in these words: "As touching kneeling, crossing, holding up of hands, knocking upon the breast, and other jestures, they may be used or left, as every man's devotion serveth, without blame;" this rubric was in the second Prayer-Book of Edward VI., and in all the subsequent Prayer-Books omitted.

wherefore it was enacted, that every minister in cathedrals, parish churches, and other places, should be bound to say and use the matins and even-song, celebration of the Lord's Supper, commonly called the mass, and administration of each of the sacraments, and all their common and open prayer, in such order and form as is mentioned in the aforesaid book, and not otherwise, under certain penalties, which we shall hereafter mention.

That the clergy might be relieved from the restraint which had been imposed on them by the Romish church, in violation of the first command given by heaven to mankind, it is declared by stat. 2 and 3 Edward VI., c. 21, that all laws, canons, constitutions, and ordinances which forbid marriage to any ecclesiastical or spiritual persons, who by God's law may lawfully marry, shall be void; and to compel the performance of marriage, where engagements had been made, the stat. 32 Henry VIII., c. 38 (only as far as concerned pre-contracts), was repealed by stat. 2 and 3 Edward VI., c. 23 (a), and the ecclesiastical judge is thereby

(a) The statute of Henry VIII. only referred to contracts *per verba de futuro*, the object being to give validity to marriages regularly performed in virtue of any pre-contract; but taken in the most extensive signification, that statute leaves open the question as to cases where such pre-contract had been consummated. It should seem that a contract *per verba de præsenti* would not be within that act, which only refers to contracts *de futuro*. Hence the present statute, 2 and 3 Edward VI., c. xxii., repealing that act, left the law as it was before. It is to be observed that the form of words of marriage found in the ritual of the Church of England, as established by the authority of parliament in the 2 and 3 Edward VI., c. i., is a form of words of present contract, and was not then for the first time made, but in part altered and in part retained from the former rituals, which had been handed down from the greatest antiquity, as appeared from the canon of the Council of Trent on the subject (*supra*, v. ii., c. i.). The law on the general subject was the same as before that of Henry VIII. That the law drew a distinction between mere contract for a marriage and its actual celebration or completion, whether by consummation or solemnization, is indeed manifest, and may be illustrated by many cases. Thus in the reign of Elizabeth this case occurred: A man and woman contracted matrimony *per verba de præsenti*, and afterwards she took another to husband, and cohabited with him, and the first sued her in the spiritual court, and sentence was pronounced that she did marry the first: "Quod prædicta Agnes subiret matrimonium cum præfato B. et insuper pronuntiatum decretum et declaratum fuit dictum matrimonium fore nullum," etc., which marriage took place, and they had issue, who were held legitimate (*Benting v. Leapingwell*, 4 Coke, 29; Moore, 169). There it was recognized in the court of law that pre-contract was a bar to a marriage, that a spiritual court could decree the celebration of the marriage first contracted, and that the issue of such marriage would be legitimate. There can be no doubt that after these statutes, though the jurisdiction in matters of matrimony still continued in the ecclesiastical courts (so far as it had been so be-

authorized to give sentence for solemnization of marriage upon a pre-contract, as before that act.

The foregoing laws were rather intended to institute and build up than to destroy; but such steps having been taken, the Reformation was pushed on with more vigor, and a sort of persecution was begun against the old superstition. It was enacted by stat. 3 and 4 Edward VI., c. 10, that since the common prayer had been set forth, containing nothing but the pure word of God, the corrupt, vain, untrue, and superstitious services should be disused; and therefore all antiphoners, missals, grailes, processionals, manuals, legends, pies, portuasses, primers, in Latin or English, couchers, journals, ordinals, and all other books, should from thenceforth be abolished; all persons and bodies corporate having any such books or images taken

fore, that is, as to the lawfulness of the marriage by the spiritual law or the law of the church), these courts were held bound by the canon law, as allowed by the laws of the realm. Thus, as Lord Coke laid down, "As in temporal matters the king, by the mouths of the judges in his courts of justice, doth judge and determine the same by the temporal laws of England, so in cases ecclesiastical and spiritual, as, namely" (enumerating among others, matrimony), "the same are to be determined and decided by the king's ecclesiastical law of this realm; and albeit the kings of England derived their ecclesiastical laws from others, yet so many as were approved and allowed were, by and with a general consent, aptly and rightly called the king's ecclesiastical laws" (*Cardross Case*, 5 *Coke's Reps.*, 1). In a subsequent case which came before the common-law court upon a motion for a prohibition, upon a suggestion that the contract was in fact *per verba de futuro*, for which the party would have a remedy at common law, the case was disposed of by the court, and the prohibition was refused, upon the ground that the spiritual courts have jurisdiction of all matrimonial causes whatever, and that there was no reason to prohibit them, because this may be a future contract, for breach of which an action would lie (*Jesson v. Collins*, 2 *Salk.*, 437; 6 *Mor.*, 155). And there Holt, C. J., said, "A marriage *per verba de præsenti* was a marriage which it has never been disputed would be correct, according to the canon law; and that law had never been interfered with by the common law, except so far as it might affect questions of temporal right and property." So Lord Hale laid it down: "The rule by which these courts proceed is the canon law, but not in its full latitude, and only so far as it stands unconnected either by contrary acts of parliament or the common law and custom of England, for there are divers canons made in ancient times, and decretals of popes that never were admitted here in England" (*Hale's Hist. C. L.*, 2). After the time of Lord Hales a case arose in which a man and his wife were members of a dissenting sect, and were married by one of their ministers, using the form of the Common Prayer, except the ring, the minister being a mere layman, and not in orders, and the wife dying, the husband took out administration to her effects, which was repealed; and the court of delegates affirmed the repeal, on the ground that the husband, demanding a right due to him as husband by the ecclesiastical law, must prove himself a husband by the ecclesiastical law (*Haydon v. Guild*, 1 *Salk.*, 119).

out of churches or chapels, were to destroy such images, and deliver such books to the bishop or his commissary within three months to be destroyed; and persons who omitted so to do were to forfeit for every book 20s. for the first offence, £4 for the second, and, for the third, imprisonment at the king's will. And for putting to utter oblivion, as the statute says, the usurped authority of the see of Rome, as well as for the necessary administration of justice, the king was empowered, in like manner as Henry VIII. had been, by stat. 3 and 4 Edward VI., c. 11, during three years to appoint thirty-two persons to examine the ecclesiastical laws and reform them; and by the same statute, c. 12, to appoint six prelates and six other persons to draw up a form and manner of making and consecrating archbishops, bishops, priests, deacons, and other ministers of the church.

The execution of these two commissions took up the attention of the reformers, and some were employed in altering the Common Prayer-Book, where exceptions had been made to it, or was otherwise thought convenient to amend or enlarge it (*a*). After this was completed, at least

(*a*) This was the act authorizing the second Prayer-Book of Edward VI., which of course superseded the first act, except so far as the former was referred to and preserved. It was referred to and preserved as to ornaments, but not as to rites, ceremonies, or forms of prayer. As to these, the well-known principle, that later statutes abrogate prior ones must prevail. And of course the force of statutes must prevail over mere ordinances of the crown, as the injunctions of Edward VI., already alluded to. Rubrics contained in the first Prayer-Book of Edward VI. are omitted in the second, and therefore, it has been held, were not preserved. The construction put upon this act has been, that no rite or ceremony not contained in it, either expressly or by direct reference, is lawful. Subsequent statutes have confirmed the present act, and as to ceremonies have abrogated any prior authority. Thus there are the 1 Elizabeth, c. ii., and the 14 Charles II., c. iv., the acts of uniformity, establishing the Book of Common Prayer in its present form. Queen Elizabeth's act of uniformity, sec. 4, which is now applicable to the present Prayer-Book, makes it penal to use any other rite, ceremony, order, form, or manner of celebrating the Lord's Supper . . . than is mentioned and set forth in the said book; and any prior authority for the practice, from usage or otherwise, would be avoided by sec. 27, which enacts that "all laws, statutes, and ordinances whereby any other service, administration of sacraments, or common prayer is limited, established, or set forth to be used within this realm, shall from henceforth be utterly void and of none effect." Rubric or note as to ornaments, in the commencement of the Prayer-Book, is in these words: "And here it is to be noted that such ornaments of the church and of the ministers thereof, at all times of their ministration, shall be retained and be in use as were in this Church of England by the authority of parliament in the second year of the reign of King Ed-

the form of ordination and the Prayer-Book (for the ecclesiastical laws took longer time, and after all were not finished soon enough to be confirmed), a second act of uniformity was passed, namely, stat. 5 ^{Act of Uniformity.} and 6 Edward VI., c. 1. This act begins by stating that many persons refused to come to their parish churches, and other places where prayer, administration of the sacraments, and preaching was used. It enacts, therefore, that all persons shall faithfully *endeavor themselves* to resort to their parish church or chapel where the Common Prayer and such service was used, upon every Sunday and holyday, and there abide during the time of Common Prayer and preaching, upon pain of the censures of the church, which the bishops are solemnly in God's name required to see executed; and they are thereby empowered to reform and punish all such offences. And because, says the statute, many doubts had arisen about the said service, "*rather by the curiosity of the ministers and mistakers, than of any other worthy cause,*" the king had caused the Book of Common Prayer to be faithfully perused and made perfect, and now annexed it, so explained and perfected, to this act; at the same time adding a form and manner of consecrating archbishops, bishops, priests, and deacons, to be of like force and authority as the former, with the same provisions as by stat. 2 and 3 Edward VI., c. 1, were ordained; which statute is declared to be in force for establishing this book, now explained and perfected, and the form of consecration

ward VI." The construction of this rubric was very fully considered by the Privy Council in the case of *Westerton v. Liddell* (*Moore*, 170); and the propositions established by the judgment in that case may thus be settled: 1. The words "authority of parliament," in the rubric, refer to and mean the act of parliament 2 and 3 Edward VI., c. i., giving parliamentary effect to the first Prayer-Book of Edward VI., and do not refer to or mean canons or royal injunctions, having the authority of parliament, made at an earlier period (*Ibid.*, 160). 2. The term "ornaments" in the rubric means those articles the use of which in the services and ministrations of the church is prescribed by that Prayer-Book (*Ibid.*, 156). 3. The term "ornaments" is confined to these articles (*Ibid.*). 4. Though there may be articles not expressly mentioned in the rubric the use of which would not be restrained, they must be articles which are consistent with and subsidiary to the services, as an organ for the singing, a credence-table from which to take the sacramental bread and wine, cushions, hassocks, etc. (*Ibid.*). On these constructions of the rubric lighted candles are clearly not "ornaments" within the words of the rubric, for they are not prescribed by the authority of parliament therein mentioned, namely, the first Prayer-Book; nor is the injunction of 1547 the authority of parliament within the meaning of the rubric (*Martin v. Maconochie*, *cor. P. C.*, 1869).

and ordination. Any person being present at any other form of prayer than according to this book, is, for the first offence, to be imprisoned six months; for the second, a whole year; and for the third, during life. For the better observation of this act, curates are directed once a year to read it on a Sunday in the church, *at the time of the most assembly*. The next statute¹ appoints the fasts and feasts as they are now in the calendar.

The last statute made upon the occasion of these alterations in religion was stat. 5 and 6 Edward VI., c. 12, to confirm and explain the former stat. 2 and 3 Edward VI., c. 21, concerning the marriage of priests. The statute says that evil-disposed persons had taken occasion, from certain words in that act, to say that it was but *a permission, like that of usury and other unlawful things*; and therefore, that children born from such nuptials should rather be accounted bastards than legitimate. To avoid this slander, the statute enacts positively that the marriage of priests and spiritual persons is true, just, and lawful, to all intents and purposes, and their children legitimate, as any other born in wedlock, as to inheritance and every other legal right. It was upon these acts of parliament that the reformed church stood at the death of Edward VI.

The article of vagrancy and begging seems to have become a greater grievance than ever; and in the solicitude to correct and suppress the effects of this evil, the parliament, during these two reigns, more than once changed its system of conduct. The first interposition was by stat.

The poor laws.

1 Edward VI., c. 3, which laments the increase of vagabonds, and declares them to be *more in number than in other regions* (a). The design now was to treat such offenders with extreme severity (a). This act,

(a) This was in effect a law under which the unhappy monks, who had been expelled from their monasteries, and were wandering about starving, should be seized and branded as slaves. "Another act," says Bishop Burnet, "was made against idle vagabonds, that they should be made slaves for two years by any that should seize them. This was chiefly designed against the vagrant monks, as appears by the provisions of the act, for they went about the country infusing into the people a dislike of the government, that is, naturally enough, complaining of being starved." "The severity of this act was such that the English nation, which naturally abhors slavery, did not care to execute it" (*Hist. Reform.*, b. ii.); that is, the act was so atrocious that it could not be executed; but it shows the spirit in which these changes

¹ Chap. 3.

therefore, begins with repealing all former laws for the punishment of vagabonds and sturdy beggars ; it then ordains that any person may apprehend those living idly, wandering, and loitering about without employment, being servants out of place, or the like, and bring them before two justices, who, upon proof by two witnesses, or confession of the party, were to adjudge such offender to be a vagabond, and to cause him to be marked with a hot iron on the breast with the mark of V, and adjudge him to be a slave to the person who brought and presented him, and to his executors, for two years. The person was to keep him upon bread, water or small drink, and refuse meat, and cause him to work, by beating, chaining, or otherwise, in any work or labor he pleased, be it ever so vile. If such slave absented himself from his master within the two years, for the space of fourteen days, then he was to be adjudged by two justices to be marked on the forehead, or the ball of the cheek, with a hot iron with the sign of an S, and farther adjudged to be a slave to his master forever ; and if he run away a second time, he was to be deemed a felon. Any person to whom a man was adjudged a slave, had authority to put a ring of iron about his neck, arm, or leg. A similar course of treatment was by act directed for clerks-convict, which will be considered in another place.

Any child of the age of five years, and under fourteen, wandering with or without such vagabonds, might be taken, and adjudged by a justice to be servant or apprentice to the apprehender till twenty years of age, if a female, and twenty-four if a man-child ; the child to be treated as a slave, and punished with irons or otherwise, if he run away. The master might assign and transfer such slaves for the whole or any part of their time. If such slaves, either during their slavery or after they were set free, beat or wounded their masters, or conspired with others so to do, they were to suffer as felons, unless the person injured would take the offender as a slave forever.

If vagabonds were not apprehended in the before-mentioned manner, every justice was required to make search for and examine all persons of that description ; and having

were carried out, and probably no such infamous piece of legislation has ever disgraced the statute-book of this or any other country as then passed under the Tudor sovereigns against the adherents to the old religion.

inquired of any one so apprehended, the town, city, or village where he was born, he was to send him, with a writing on parchment testifying his vagrancy and settlement, from constable to constable, to the head-officer of such place; to be made a slave to the inhabitants thereof in some public works, for the term and under all the circumstances before-mentioned in the case of any private master, with a penalty on the place if such slave was suffered to pass three working days without employment. Such towns and the inhabitants might assign or transfer their slaves, as private masters. If it happened that the vagabond was not born at that place, he was to be made a slave to the inhabitants for the lie he had told, and was to be marked with an S. Foreign vagabonds were to be treated in the same manner as English, except the marking in the breast or face; and they were to be sent to the next port to work till they could be conveyed abroad, at the cost of the inhabitants.

Thus far of vagabonds: those idle persons who, from their infirmities, could not be properly treated as such, and who were born, or had been for the most part conversant and abiding for the space of three years in any place, were to be sought out before a certain day mentioned in the act, by the head-officer of the place, and provided with cottages, or other convenient houses to be lodged in, and relieved and cured by the devotion of the good people of the place. None but such as were born there, or had been conversant and abiding for the above space, were after that day to remain and beg abroad within the precinct of the place: and a penalty was imposed on the head-officer suffering it three days. For the clearing away of such as were not so settled, head-officers were required to make a search every month, and send them away in carts or otherwise, from constable to constable, to their proper settlement, under penalty for neglect of such search. If such infirm persons were not wholly disabled from working, the inhabitants were to provide them work in common, or appoint them to such private persons as would; and such as refused to work, or run away, were to be punished discretionally with chains, beating, or otherwise. For the promotion of this plan, the parson or curate every Sunday, after reading the Gospel, was to exhort the people to remember the poor people, their

brethren in Christ, born in the same parish, and needing their help.

The parliament did not rest content with this act. The great and unexampled severity of those provisions about slavery had prevented it from being carried into execution. Something new was therefore done on this subject a few years after. By stat. 3 and 4 Edward VI., c. 16, the before-mentioned statute, and every other act on this subject, except stat. 22 Henry VIII., was repealed; and it was ordained, that the ordering of vagrants and beggars should depend upon stat. 22 Henry VIII., c. 12,¹ which statute was confirmed forever: in addition to which this statute re-enacts all the provisions of the former act of this reign respecting settlements, the passing of vagrants, the providing for the infirm, and setting them to work, in the very words of that statute, except the punishment of slavery. The direction about children was altered in this way: the child was to be brought into the open sessions by the apprehender, who was to promise to bring it up in honest labor till, if a woman, the age of fifteen; if a man, of eighteen; upon which the justices were to adjudge the child to be a servant, *according as the law and custom of the realm is of servants without wages*. If the child ran away, it was to be punished by the stocks, or at the master's discretion, who might also have a justice's warrant under the statute of laborers; and if any person enticed such child away, the master might have an action on the statute of laborers. Two neighbors might complain to the session if the child was maltreated, and the justices might discharge him from the service, and assign him to another master.

In the following parliament this matter was again taken up. By stat. 5 and 6 Edward VI., c. 2, the stat. 22 Henry VIII., c. 12, and stat. 3 and 4 Edward VI., c. 16, were confirmed, subject, however, to the following corrections. The first of these amendments has more the appearance of a compulsory levy for support of the poor than anything we have yet met with. In cities, boroughs, and towns-corporate, the mayor or head-officer, and in other parishes the vicar or curate and the churchwardens, were to have a register of the inhabitants and householders, and of the

¹ *Vide ante.*

needy persons not able to support themselves; and with this they were, in the church, quietly after divine service to call together the inhabitants and householders, and elect and nominate out of them, yearly, two or more to be collectors of alms. These collectors, the Sunday following, while the people were at church, and had heard God's Holy Word, were gently to ask and demand of every man and woman what they would be content to give weekly towards the relief of the poor, which was to be written in the register. After this, the collectors were to gather and distribute such alms weekly to the poor for their support, or to put them to labor, as it seemed best. These collectors were to account to the principal persons before mentioned every quarter, at which any of the parish might be present; and when they went out of office, they were to deliver over all surpluses to the common chest of the church. If they refused to account, the ordinary might proceed against them with spiritual censures. If any refused to contribute, the parson, vicar, or curate, and churchwardens were gently to exhort him towards the relief of the poor: if he would not be persuaded, then, upon certificate of the parson, vicar, or curate, the bishop might send for him, and try to persuade him, and so, according to his discretion, take order for the reformation thereof.

For the better ordering of the military state, several provisions were made by statute in the reign of Edward VI. respecting soldiers¹ and musters, and some acts passed for maintaining in vigor and readiness the ancient militia.²

To take away temptations to idleness is the most effectual way of guarding against the increase of that order of people who are the objects of the foregoing laws. A law was made to lessen the number of tippling and gaming-houses. By stat. 5 and 6 Edward VI., c. 25, two justices have authority to remove and put away the common selling of ale and beer in common ale-houses and tippling-houses, in such towns and places as they thought meet (a). None were to keep such house,

(a) This was the origin of the modern licensing acts, and also of the "Tippling Act," as it is called, the 24 George II., c. 40, by which vendors of spirits in small quantities are disabled from recovering the price. There is also the 25 George II., c. 36.

¹ Stat. 2 and 3 Edward VI., c. 2; and stat. 4 and 5 Philip and Mary, c. 3.

² Stat. 4 and 5 Philip and Mary, c. 2.

unless admitted and allowed in open sessions, or by two justices; and they were also to give a recognizance for not using unlawful games, and for the maintenance of good order and rule. This was to be certified to the sessions, where the justices might inquire by indictment, information, or otherwise, if such persons had broke their recognizance. Persons selling liquors without such authority, might be committed to jail for three days, and till they entered into a recognizance not to keep any such house.¹

The parliament were not inattentive to such objects as concerned the public weal and improvement of the country. Among these, the first was agriculture. We find a statute of Edward VI. for the improvement of common and waste lands,² in confirmation of the stat. of Merton, c. 4, and stat. Westminster 2, 13 Edward I., c. 46;³ and further, all persons recovering in an assize on either of those statutes, were to have treble damages (*a*). It was,

(*a*) This was the era of enclosure acts, although enclosures had begun in the time of Henry VII. (*Bacon's Life of Hen. VII.*, 43). It is remarkable that the acute and observant mind of Bacon should not have suggested some cause for it; but he records the fact and its consequences without suggesting the reason, unless it is implied in the way in which he states the fact. Enclosures at that time began to be more frequent, whereby arable land (which could not be manured without frequent families) was turned into pasture, which was easily rid by a few herdmen; and tenancies for years, lives, and at will, whereupon much of the yeomanry lived, were turned into demesne, *i. e.*, into land held by the owners or lords in their own land, without being let out to tenants. That cultivation requires tenants is beyond a doubt, but it is as clear that it requires enclosure; and it is not so clear how the extension of pasturage should tend to the increase of enclosures, for enclosures have usually in our own time been for the purpose of turning pasture land into arable land, common land being always, for obvious reasons, "pasture." And hence it was that the ancient statute of Merton as to enclosures or "improvement" from the waste land was expounded as in favor of agriculture. It would appear, however, that the owners or lords were now encroaching on the common or waste lands, not so much for the extension of agriculture as for the extension of their own demesne lands, and with a view to some profits to be derived from pasturage, probably by reason of the extension of the trade of wool. And although pasture might be well held in common when it was merely in aid of or in conjunction with agriculture, it would be otherwise when it was pursued rather for its own sake, with a view to some pecu-

¹ The licenses to keep gaming-houses, which were sanctioned, as we have seen, by the statutes of Henry VIII., were greatly abused, and became the source of much evil. To remedy this, it was enacted by stat. 2 and 3 Philip and Mary, c. 9, that every license, placard, or grant for the keeping of any bowling-alley, dicing-house, or for other unlawful games, should be null and void.

² Stat. 3 and 4 Edw. VI., c. 3.

³ *Vide* vol. ii.

however, provided, that where houses had been built upon waste grounds, not having three acres enclosed, and an

liar profit. It appears that the suppression of the monasteries in the last reign had tended greatly to increase the appropriation of land to pasturage. For in a proclamation issued by Edward VI., as stated by Strype, it was lamented that the realm was wasted, by bringing arable land into pasture, and letting houses and families decay and waste; so that various villages were entirely destroyed, and one shepherd dwelt where many industrious families dwelt before; and it appeared that the law which commanded the owners of church lands to occupy as much of the demesne lands in tillage as had been so occupied twenty years before, were disobeyed (*Strype*, ii., 92). Hume states that the suppression of monasteries had tended to the decay of agriculture. "The monks, residing in their monasteries, in the centres of their estates, spent their money in the provinces and among their tenants, and were acknowledged to have been the best and most indulgent landlords, and the abbots and priors were permitted to give leases at under rents. But when the abbey-lands were distributed among the principal nobility and courtiers, they fell under a different management. The rents of farms were raised, while the tenants found not the same facility in disposing of the produce; the money was spent in the capital, and the farmers being at a distance, were exposed to oppression from the new masters, or to the still greater rapacity of their stewards" (*Hist. Eng.*, c. xxxv.). These new owners would naturally look rather to the immediate increase of their revenues than to the benefit of their tenants, and hence the trade in wool was chiefly looked to, agriculture declined, and the tenantry were decayed; and thus, as Hume says, pasturage was found more profitable than tillage. He adds, "Whole estates were laid waste by enclosures; the tenants, regarded as a useless burden, were expelled their habitations; and the cottagers, deprived of the commons on which they formerly fed their cattle, were reduced to misery" (*Ibid.*, citing *Strype*, vol. ii.). The same greed for gain which prompted the owners to pursue the readiest and most rapid mode of making money by the land would prompt them to enclose it, and therefore their enclosures of land they appropriated to their pastures. Hence insurrections arose, in consequence of which commissions were issued by the crown, to hear and determine causes about enclosures (*Ibid.*, citing *Strype*, vol. ii., p. 170; *Burnet*, vol. ii., p. 115). Then this statute was passed to make provision for the permanent settlement of the question, and it formed the precedent for the modern enclosure acts. It is to be observed that a common of pasture was usually attached to arable land. For Lord Coke says, "The beginning of common appendant by the ancient law was in this manner,—when a lord enfeofed another of arable land, to hold of him in socage — *i. e.*, *per servicium socce* (or in plough-service), as every such tenure at the beginning was — then the feoffee should have common on the lord's waste for his necessary cattle, which ploughed and manured his land, because he could not plough and manure his land without cattle, and they could not be kept without pasture." "And it was for the maintenance and advantage of tillage, which was much respected and favored in law," says Coke, so that such common appendant was of common right, and commenced by law. But then it was only appendant to arable land, and only for cattle, *i. e.*, horses and oxen to plough, cows and sheep to manure. And therefore it was against the nature of common appendant to be appendant to pasture or meadow, and so it could not be appendant to a house and pasture-land or woodland. Hence it is manifest, that if arable land were thrown out of cultivation, much common of pasture would cease to be required. But Lord Coke seems to think that the cause was, that arable land was thrown out of cultivation in order to be turned

orchard, garden, or pond, not exceeding two acres, which did no hurt to the waste, and were a great convenience to the owner, they should not be considered as within the meaning of the above statutes. This proviso was in favor of husbandry and cultivation. The preferring of tillage to pasture, as had been done by former statutes, with the support of farm-houses and other expedients for promoting husbandry, were insisted upon, and encouraged by several statutes.¹

The course of trade, and the conduct of manufacturers, still continued to engage the notice of the legislature; but the number of acts about buying and selling, retaining servants and apprentices, are too tedious to make a part of our inquiry. The principal of these was stat. 5 and 6 Edward VI., c. 14, which gives a definition, and directs the punishment of certain offenders against the fair dealer, called ingrossers, forestallers, and regraters.

Among the regulations respecting trade we may reckon the repeal of the stat. 37 Henry VIII., c. 9, concerning usury. It is complained by stat. 5 and 6 Edward VI., c. 20, that the former act had been construed to give a license and sanction to all usury not exceeding ten per cent.; but

into pasture, and that this was the mischief at which the statute of Henry VII., was aimed at, of which there can be no doubt (*Tyringham's Case*, 4 *Coke's Reps.*, 39). Many causes had contributed to throw land out of cultivation: one was the operation of the feudal system, which, when land was in ward, made it difficult to grant leases. A statute had passed on the subject in the last reign, but the effect was not to be produced soon. It is natural here to mention two subjects closely connected with that of enclosures and agriculture, viz., the commissions of sewers and the care of the highways. The 3 and 4 Edward VI., c. viii., made perpetual the statute of 23 Henry VIII., c. v., which established temporary commission of sewers for the protection of the land from the encroachments of the sea upon internal floods, and this statute was aided by one in the reign of Elizabeth. Then, as to highways, in the 2 and 3 Philip and Mary, c. viii., a statute was passed for the appointment of surveyors of highways, to take charge of repairs of the roads, and to enforce statute-labor. This was the era of private acts, whether for enclosure or disgravelling. For instance, in a recent case, in ejectment for lands in Kent, the plaintiff's case depended upon showing that the lands in question had been disgravelled by a private act, which was alleged to have been passed in the 2 and 3 Edward VI. The act, after proper search, could not be found. As secondary evidence of its contents, there was produced an office copy of a special verdict returned upon the trial of a feigned issue in the 13 and 14 Charles II., wherein the jury found, that, at a parliament, etc., holden, etc., it was enacted, etc. The act was then set out, whereby certain lands in Kent were disgravelled (*Doed d. Bacon v. Bridges*, 6 *Man. & G.*, 282).

¹ Stat. 5 and 6 Edw. VI., c. 5. Stat. 2 and 3 Philip and Mary, c. 2.

this construction is declared to be utterly against scripture, and therefore all persons are forbid to lend, or forbear by any device, for any usury, increase, lucre, interest, or gain whatsoever, on pain of forfeiting the thing, and the usury, or interest, and of being imprisoned and fined; and so the law stood till the 13th of Elizabeth.

Respecting games and diversions, an act was made in the spirit of those in the time of Henry VIII.,¹ about hand-guns, by which shooting hail-shot was prohibited absolutely,² even to persons licensed to shoot by the former acts. On the other hand, a statute of Henry VIII. against the shooting of wild-fowl was repealed.³

A proper administration of justice and of services of trust was promoted by an act against the sale of offices. This is stat. 5 and 6 Edward VI., c. 16, which enacts, that if any person sell an office, or take any money or other profit, directly or indirectly, or any promise of it, for any office or deputation of office, or to the intent that any person shall have an office which concerns the administration or execution of justice, the receipt, or comptrolment, or payment of any of the king's treasure, or surveying of any of the king's castles, manors, lands, or any of the customs, or the keeping of any of the king's towns, castles, or fortresses, or any clerkship in a court of record, the person so taking any reward or promise of reward for selling, shall be judged to lose and forfeit all right, interest, and estate which he has in such office; and the person making such offer to purchase shall be deemed incapable to enjoy the said office, and all bargains, bonds, covenants, and agreements, concerning such a transaction, are declared void. This act, however, is not to extend to offices of inheritance, nor to the parkership or keeping of any park, house, manor, garden, chase, or forest; nor to the Chief-Justices of the King's Bench and Common Pleas, nor to justices of assize; who are left at the same liberty to dispose of offices as before this act.

Several regulations were made by stat. 2 and 3 Edward VI., c. 13, respecting the payment of tithes (a), all of which contributed to secure the clergy

Payment of
tithes.

(a) The jurisdiction to determine on the liability or right of tithe was previously in the spiritual courts, though the question of a discharge from

¹ *Vide ante.*

² Stat. 3 and 4 Edw. VI., c. 7.

³ Stat. 2 and 3 Edw. VI., c. 14.

in a more regular receipt of that inconvenient though substantial and effective provision. The act begins by

tithe might be in the temporal courts. Thus a prescription for a *modus decimandi* would be within the jurisdiction of the spiritual courts, but a prescription in *non decimandi* would not be so (*Hutton v. Barnes, Yelverton's Reps.*, 79; *Crocker v. Fryar, ibid.*, 2). If a *modus* was proved, the jurisdiction to enforce it would be in the king's court; that is, so long as the tithe remained payable in kind, it would be in the spiritual court (*Ibid.*, 53). The fundamental principle was, that tithes were spiritual (*Ibid.*, 132); and therefore, ordinarily and primarily the right or liability to tithes was a question for the spiritual tribunals, although, if it turned on a common-law title, it was for the king's courts. As to the right of tithes, it was of common right to the parson, for at common law tithes belonged to the parson, and the vicarage was derived out of the parsonage; so that no tithes belong *de jure* to the vicar, but only on disendowment or prescription; and if a custom was not set up by the vicar, it would be for the king's court (*Ibid.*, 81, *Green v. Austen*). The cases on this statute seem to have been numerous, as a good many are to be met with in the book; and they are extremely illustrative of the state of the law as to tithes. Thus, in the early part of the reign of James I., in an action on the statute, the plaintiff showed that the rector of Moodbury had two parts of the tithes, and that the vicar had the third part; and that they had, by several leases, devised the tithes to him; and that the defendant sowed so many acres within the parish, wheat, rye, etc., and carried them away without setting forth the tenth part, etc. And upon the general issue pleaded it was found for the plaintiff; and it was objected that he had joined several actions, as he claimed under several titles, that of the rector and the vicar. But it was held otherwise, for though these titles were separate, they could be joined in person, and it was enough to show the plaintiff owner of the tithes, and he did not demand *tithes* in the action, so that the title to the tithe could not come into question, and the action was grounded upon the contempt of the statute; and the plaintiff should recover damages, and afterwards could not claim the tithes (*Champernon v. Hill, Yelverton's Reps.*, 63). In another case the plaintiff showed that he was parson of the parish church of Little Lavar in Essex, and that the defendant had so many acres sowed in wheat, whereof the tenth part recovered came to £28; and that he took and carried away the wheat without setting out the tithes, whereby it was alleged he forfeited £60, which the plaintiff claimed as treble value; and the plaintiff having obtained the verdict, had judgment. And it was resolved, in another similar case, that the defendant having pleaded a collateral defence, he should pay the value stated in the declaration, which was deemed to be admitted (*Oliver v. Collins, Yelv.*, 126). It will be observed that the statute only applied to the *setting out of tithes, i. e., tithes in kind*. But in many cases the payment of tithes ceased before or after the time of this act; and it has often appeared that no tithes in kind had been paid for centuries, and that many compositions or *modus*es had come to be paid for the tithes. (This is shown by the production of what are called tithe-termors.) The 13 Elizabeth, c. 20, interposed an obstacle in the way of alienation of tithes. The defences to the claim of payment of tithes in kind were *modus decimandi*, which was either a custom time out of mind, within a district, of paying tithes in one constant mode fixed by the custom, and depending on some antecedent agreement made before legal memory between the parishioners and the parson, patron, and ordinary, for giving to the parson some definite profit in lieu of tithes, or by prescription, in the case of individual lands, founded on a like agreement; secondly, discharge by composition real, which scarcely differed from a

confirming the stat. 27 Henry VIII., c. 20, and 32 Henry VIII., c. 7,¹ both made on the same subject and with the same view. In order to further the intention of the makers of those two laws, it moreover enacts that every one of the king's subjects shall truly and justly, without fraud or guile, set forth and pay his predial tithes, in their proper kind, as they rise and happen, in the manner they had been, or ought to have been paid, for the last forty years before that act: and none shall carry away such tithes before he has set forth the tenth part, or agreed for it with the parson, vicar, or proprietor, under the penalty of forfeiting the treble value of the tithes so carried away. So far a temporal remedy in the secular courts is given for a breach of this duty. In the next clause of the act a remedy is given in the spiritual court for the like injustice; for the act says, as often as the predial tithes shall be due, the party to whom they ought to be paid, or his deputy, may come and view them, to see that they are justly set forth. And if any person carry them away before they are set forth, or withdraw them, or prevent the parson, vicar, or proprietor, or their deputies, from viewing them, as before mentioned, by reason whereof the tithe is lost, impaired, or hurt, then, upon complaint to the spiritual judge, the party offending is to pay double

modus in any other respect than by having its commencement after legal memory and before the disabling statute (3 *Eliz.*, c. xxi.), etc., being founded on a deed or writing. There were difficulties, it will be observed, in both these modes of defence, and hence the necessity for some statute to allow of tithe commutations. And, therefore, the 6 and 7 William IV., c. 71, the Tithe Commutation Act, provided for the composition of tithes. Upon the above statute, in the reign of Elizabeth, there was a very important decision, viz., that if land be overflowed with water, and afterwards gardenized by industry, tithes shall presently be paid thereof, although it had been overflowed from time whereof memory of man was not to the contrary. So if land be full of thorns and bushes from time immemorial, and it is grubbed up, and made meadow or arable land, tithes shall presently be paid thereof, notwithstanding the provision in this statute; for those lands, of their own nature, were not barren, but by negligence or ill husbandry became so. And the statute doth not intend that tithes shall not be paid within seven years after the manurance, etc., but of such land which was merely barren, and made good by foldage or other industrial means (*Sherington v. Fleetwood*, Cro. *Eliz.*, 475). It is to be observed, that it is recited in this act that land might be discharged of tithes by prescription; but that (it was said afterwards) could not be in the case of *laymen*, and, therefore, it must have been meant of spiritual persons (*Bishop of Winchester's Case*, 2 *Coke's Reps.*, 45; 10 *Eliz.*, *Dyer*, 277). It was there said also, that *laymen* could have no remedy for tithes until the act of Henry VIII.

¹ *Vide ante.*

the value of the tithes so taken, lost, withdrawn, or carried away, besides costs of suit.

These are the two general provisions relating to the collection of predial tithes: the remainder of this act is taken up with other matters incident to tithes of various kinds; all of which have been considered in a former part of this history.¹ Persons² who depasture tithable cattle in waste grounds whereof the parish is not certainly known, are to pay the tithe of such cattle to the parson or proprietor of the parish, hamlet, or town, where they dwell: Waste grounds which had paid no tithes before this act, by reason of their barrenness, were, at the end of seven years next after being fully improved, to pay tithe of corn and hay growing there.³ Every person exercising merchandise, bargaining and selling, clothing, handicraft, or other art or faculty, who had paid personal tithes within forty years before this act, is yearly, before Easter, to pay for his personal tithes the tenth part of his clear gains; his charges and expenses, according to his estate, condition, or degree, to be therein abated and deducted. But these provisions were not meant to infringe either compositions real,⁴ or any custom by which handicraftsmen might have formerly paid their personal tithe.⁵ If any person refuse to pay his personal tithe, as above ordered, the ordinary may call him before him, and may examine him by all lawful means other than by his own corporal oath,⁶ concerning the true payment thereof.

Offerings and the tithes of fish are to be paid as heretofore, according to the custom of different places.⁷ It was provided, that the inhabitants of the city of London and Canterbury, with their suburbs, and every other town or place where they have been used to pay their tithe by their houses, shall not be taken as within the meaning of this act.⁸ A custom which had prevailed in Wales, of demanding a tithe of cattle and other goods given at the marriage of any one, was hereby abrogated.⁹

The rest of this act concerns judicial proceedings for recovery of tithes. Suits for subtraction of tithes, or any of the before-mentioned duties, are to be in the ecclesiastical court, and not before any other judge.¹⁰ Any party disobeying the ecclesiastical sentence may be excommu-

¹ *Vide ante.*² *Ibid.*, 5.³ *Ibid.*, 38.⁴ *Sect.* 10, 11.⁵ *Ibid.*, 16.⁶ *Sect.* 3.⁷ *Ibid.*, 4.⁸ *Vide ante.*⁹ *Ibid.*, 12.¹⁰ *Ibid.*, 13.

nicated; and if he wilfully so remain for forty days after publication thereof in the parish church or place where he dwells, the spiritual judge may signify the same to the king in Chancery, and thereupon require process *de excommunicato capiendo*. That such suits may not be wantonly delayed by prohibitions, before any prohibition shall be granted, the party suing for it is to deliver to some of the judges of the court a true copy of the libel depending, and under the copy is to be written the suggestion; and if the suggestion is not proved by two honest and sufficient witnesses, within six months after the prohibition awarded, there is to go a consultation; and double costs and damages are to be recovered against the persons suing the prohibition, to be assessed by the court granting the consultation. However, lest it might be imagined that the jurisdiction of the spiritual judge was intended to be hereby enlarged, it is provided, that¹ he shall not hold plea of anything contrary to stat. Westm. 2; 13 Edward I., c. 5, *articuli cleri, circumspectè agatis, silva cædua*, the treatise *De Regiâ Prohibitione*, or stat. 1 Edward III., c. 10,² or of any matter which belongs to the king's court.

To protect the clergy, in another instance, an act was made in the same sessions to moderate and qualify the penalty of deprivation from *all* their ecclesiastical preferment, inflicted by stat. 26 Henry VIII., c. 3, on those who were certified by the collector not to have paid their tenths. It was now declared by stat. 2 and 3 Edward VI., c. 20, that such defaulter shall be deprived *ipso facto* of that only dignity, benefice, or other spiritual promotion, whereof the certificate shall be made; and they are no longer to be thereby disabled from enjoying any other benefice or preferment. The papistical piety of Queen Mary dictated another application of tenths and first-fruits of ecclesiastical preferments. They were by stat. 2 and 3 Philip and Mary, c. 4, no longer to be paid to the queen; and the tenths before that paid according to stat. 26 Henry VIII., c. 3, were to be employed to other godly purposes.

The statutes which next deserve our notice are such as relate to certain special modes of redress; as the traverse of offices, the impounding of distresses, and the sale of stolen horses; after which will naturally follow such al-

¹ Sect. 15.

² *Vide* vol. iii.

terations and improvements as were made, during these two reigns, in the more general remedies, and the execution of justice. The stat. 2 and 3 Edward VI., c. 8, was made in favor of such persons as used Traverse of offices. sometimes to be precluded of their rights¹ by untrue finding of offices. As, for instance, persons holding terms for years, or by copy of court-roll, were often put out of their possession by reason of inquisitions, or offices found before escheators, commissioners, and others, entitling the king to the wardship or custody of lands, or upon attainders for treason, felony, or otherwise; and this, because such terms for years and interests in copyhold were not found: after which they had no remedy, during the king's possession, either by traverse or *monstrans de droit*, because such interests were only chattels or customary hold, and not freehold. In like manner, persons having any rent, common, office, fee, or other profit *apprendre*, if such interest were not found in the office entitling the king, they had no remedy by traverse, or other speedy means, without great and excessive charges, during the king's right therein. To redress these hardships on the subject, it is declared, that all persons in the above cases shall enjoy their rights and interests, the same as if no office or inquisition had been found, or as they might if their interest had been regularly found at the same time in such inquisition or office.² Remedy was given where a person was found, untruly, to be heir of the king's tenant, and the like. And where a person is untruly found lunatic, idiot, or dead, and in some other cases, it was enacted, that the party grieved shall have a traverse, and proceed to trial thereon, and shall have the like advantages as in other cases of traverse upon untrue inquisition and offices.³ The same of untrue finding when a person is attainted of treason, felony, or *præmunire*, the party grieved may have a traverse, or *monstrans de droit*, without being driven to a petition of right.⁴ In all traverses, taken according to this act, it is enacted, that the person pursuing his traverse shall sue out a writ of *scire facias*, one or more, as the case shall require, against such person as shall have an interest either by the king or his patentee, in like manner as upon traverses and petitions in other cases, with like pleas to the defendants in *scire facias*.⁵

¹ *Vide ante*.² Sect. 3.³ *Ibid.*, 6.⁴ *Ibid.*, 7.⁵ *Ibid.*, 13.

We come now to such acts as were made to promote a better administration of justice. It was enacted by stat. 2 and 3 Edward VI., c. 25, that Administration of justice. whereas the county courts in some shires were held from six weeks to six weeks, and attorneys, not aware of that private custom, sued out process with like returns as if they were held monthly, to the great delay and impediment of suitors, no county court shall be longer deferred than one month. In order to quiet possessions, and facilitate the giving evidence of titles, it is enacted by stat. 3 and 4 Edward VI., c. 4, that, respecting all letters-patent made since 4th February, 27 Henry VIII., a person may make title by way of declaration, plaint, avowry, title, bar, or otherwise, to lands, honors, and hereditaments, under the king's patentees, by showing forth an exemplification or *constat* of the letters-patent, which shall be of the same force and effect as the originals.

The process of the law was improved in one point by stat. 1 Edward VI., c. 10. The writs of proclamation ordained by stat. 6 Henry VIII., c. 4,¹ in cases of outlawry, were to be directed to the sheriff of the county where the party lived: but when the defendant lived in Wales, or a county palatine, they were made into the adjoining county. The present act directs that, where a defendant dwells in Wales, or in the county palatine of Chester, or of the city of Chester, the justices of the court shall have authority to award a writ of proclamation to the sheriffs of those places; to them also are to be directed² writs of *capias utlagatum*, as immediate officers of the King's Bench and Common Pleas. The same was done by stat. 5 and 6 Edward VI., c. 26, with respect to the county palatine of Lancaster. For receiving such process, those sheriffs are required to have deputies in the Court of King's Bench and Common Pleas. As the statute of fines did not extend to the county palatine of Chester, the same provision was made by stat. 2 and 3 Edward VI., c. 28, to give effect to fines levied before the high-justice of Chester, or his deputy, as had been made in the last reign respecting fines in the county of Lancaster.³ By stat. 1 Edward VI., c. 7, it is enacted, that no suit shall be discontinued by reason of the king's death;

¹ *Vide ante*.² Sect. 4.³ *Vide ante*.

that the subsequent judicial process shall be made out in the style of the reigning king, and the variance in such process between the names of the kings shall not be error; but no assize of *novel disseisin*, of *mortauncestor*, *juris utrùm*, or attain, depending before the justices of assize, shall be discontinued by reason of death, new commission, association, or not coming of such justices; that though any plaintiff be made duke, archbishop, marquis, earl, viscount, baron, bishop, knight, justice of the one bench or the other, or serjeant-at-law, no writ or action shall be abatable; and that a justice of assize, of gaol-delivery, or of the peace, or a person being in any other of the king's commissions whatsoever, though preferred to any of the above honors, shall yet remain justice and commissioner, and execute his commission as before.

Moreover, it was enacted that, where a person is found guilty of any felony whatsoever, for which judgment of death should or may ensue, and shall be reprieved, without judgment, and committed to prison; any who shall be afterwards assigned justices to deliver that gaol, may give judgment of death, as the former justices might have done; and that no process or suit before justices of assize, gaol-delivery, *oyer* and *terminer*, of the peace, or other commissioners, shall be discontinued by the publishing of any new commission or association, or by altering the names of the justices or commissioners; but that the new justices and other commissioners may proceed as if the old commission had still remained.

In reviewing the changes made in our criminal law during these two reigns, we shall first go through the statutes of Edward VI., and then proceed to those of Queen Mary. The criminal law was very materially affected by statutes made in the reign of Edward VI., which we shall now mention in the order in which they were made. The statute of 1 Edward VI., c. 12, makes a kind of date in the history of offences, by repealing many harsh laws (a), and making several beneficial provisions, as well for the protection of the subject as the punishment of delinquents. It is introduced by a pre-

Criminal law.

(a) But it only repealed those against a certain class of offences, as, for instance, heresy against the Roman Catholic religion; and similar laws were re-enacted against the Roman Catholic religion, as, for instance, against the papal supremacy.

amble not unworthy of notice. Having said, "that on the part of a prince, the people should wish for clemency and indulgence, and rather too much forgiveness and remission of royal power and punishment, than exact severity and justice to be showed; and that, on the part of the subject, he should rather obey for love than strait laws; yet," it goes on, "sharper laws, as a harder bridle, should be made to stay those men and facts that might else give occasion of further inconvenience." This consideration "caused King Henry VIII., and other his progenitors, to make statutes very *strait, sore, extreme, and terrible*, although then not without great consideration moved and established; and, for the time, to the avoidance of further inconvenience, very expedient and necessary. But as in tempest or winter one course and garment is convenient, in calm or warm weather a more liberal case or lighter garment both may and ought to be followed and used; so we have seen divers strait and sore laws made in one parliament (the time so requiring), in a more quiet and calm reign repealed. Which example the king being willing to follow, is contented and pleased that the severity of certain laws be mitigated and remitted." It is therefore

Repeal of treasons and felonies.

ordained, that no act or deed, being by statute made treason or petit treason, shall be so deemed, but only such as are treason or petit treason by stat. 25 Edward III., stat. 5, c. 2, and by this present act; and¹ all offences made felony by parliament since 23d April in the first year of Henry VIII., and all acts making such offences felony are repealed, with the exception of all statutes concerning the counterfeiting of the coin of this realm, or of any other current within the realm, or concerning the bringing in of counterfeit money; nor was this repeal to extend to stat. 27 Henry VIII., c. 2,² concerning those who counterfeited the king's sign-manual, privy-signet, or privy-seal, their counsellors, aiders, and abettors;³ nor to stat. 27 Henry VIII., c. 17,⁴ concerning a servant embezzling his master's goods.⁵ It also declares that in all cases of felony, except those mentioned in this act, every one found guilty upon his arraignment, or who confesses, or stands mute, or will not answer directly, shall have his clergy.⁶

¹ Sect. 4.

² *Vide ante*.

³ Sect. 8.

⁴ *Vide ante*.

⁵ Sect. 18.

⁶ *Ibid.*, 10.

It also repeals, as we have before observed, the statutes of Richard II., Henry V., and Henry VIII. against heretics: and after specifying these statutes by name, it repeals generally all acts of parliament concerning doctrine and matters of religion.¹ It likewise repeals² stat. 31 Henry VIII., c. 8, that proclamations made by advice of the council should be obeyed, as acts made by parliament; and stat. 34 and 35 Henry VIII., c. 23, for the due execution of such proclamations.

So far this act is employed in repealing certain laws of a severe cast; the remainder of it is taken up either in enacting some new offences, or making some beneficial qualifications of criminal proceedings.

In the first place, it was ordained, if any person, by open preaching, express words or sayings, affirmed that the king was not, or ought not to be, supreme head of the Church of England and Ireland, immediately under God (*a*); or, that the Bishop of Rome, or any other person, was or ought to be by the laws of God, supreme head of the same churches; or that the king was not king of England, France, and Ireland; or if any one did compass or imagine, by open preaching, express words or sayings, to depose the king from his estate, or deprive him of his titles; or did openly publish or say, that any person other than the king of right ought to be king; every such offender, his aiders, or abettors, should for the first offence forfeit all his goods and chattels, and suffer imprisonment during the king's pleasure; for the second offence, forfeit the issues and profits of his lands, benefices, and other spiritual promotions, for life, with his goods and chattels, and be imprisoned during life; the third offence to be high treason.³ If the above offences were committed by writing, printing, overt deed, or act, it was high treason for every offence.⁴ It was, besides, enacted, for confirming

(*a*) This was a re-enactment in its worst form of one of the sanguinary laws of Henry against the papal supremacy, that is, the spiritual supremacy of the pope, as head of the Roman Catholic Church, a supremacy which had been recognized by the law of the land from time immemorial, for the very reason that it was purely spiritual, and not allowed to be exercised in any cases not purely spiritual, except by reason of usage, allowed by the law, and recognized by the king's courts. As, therefore, this was a purely spiritual doctrine, and lay at the basis of the Roman Catholic religion, it was in effect proscribing that religion, and making it punishable with death, and death of a peculiarly horrible and brutal kind.

¹ Sect. 3.

² *Ibid.*, 5.

³ *Ibid.*, 6.

⁴ *Ibid.*, 7.

the succession established by stat. 35 Henry VIII., c. 1,¹ that if any of the king's heirs, or persons to whom the crown was limited by that act, usurped the one of them upon the other, or interrupted the king in the quiet enjoyment of the crown, it should be adjudged high treason.

After enacting the above treasons and offences, this statute takes away clergy from persons convicted or attainted of the following crimes: of murder of malice prepensed; of poisoning of malice prepensed; of breaking of any house by day or by night, any person being then in the same house where the breaking shall be committed, and thereby put in fear or dread; for robbing of any person or persons in the highway, or near the highway; or for felonious stealing of horses, geldings, or mares; of felonious taking of any goods out of any parish church, or other church or chapel. In all these cases clergy is taken away, if the party is found guilty by verdict, or confession, or will not answer directly, or stand wilfully and maliciously mute.²

For removing doubts and defining the extent of crimes, in two instances, it is declared³ that concealment, or keeping secret any high treason, shall be adjudged misprision of treason; and that⁴ all wilful killing by poisoning shall be deemed wilful murder of malice prepensed; it having been declared high treason in the former reign.⁵

Some provisions are made respecting incidents of trials, and the like. It is declared, that the statutes made in the time of Henry VIII., and all clauses of statutes concerning challenge for the county hundred, or peremptory challenge; or concerning the trial of foreign pleas, pleaded by murderers, felons, or other offenders, shall remain in force;⁶ which are stat. 35 Henry VIII., c. 6, stat. 4 Henry VIII., c. 2, stat. 22 Henry VIII., c. 2. And wherever a common person may have his clergy, as a clerk-convict who may make his purgation; and also in all cases where the privilege of clergy is taken away by this act (wilful murder and poisoning of malice prepensed only except); a lord of parliament and peer of the realm, having place and voice in parliament, by claiming the benefit of this act, though he cannot read, without any burning in the

¹ *Vide ante.*² Sect. 10.³ *Ibid.*, 20.⁴ *Ibid.*, 13.⁵ *Vide ante.*⁶ Sect. 11.

hand, loss of inheritance, or corruption of blood, is to be deemed, for the first time only, as a clerk-convict who may make purgation;¹ and such a person is to be tried for *any* of the offences limited in this act by his peers, as in cases of high treason.²

That the objection of bigamy might no longer be a cause for precluding any one from his privilege of clergy, it is declared, that persons who have been sundry times married to single women or widows, shall, notwithstanding, have this benefit;³ and that the wife of any one attainted, convicted, or outlawed of any treason, petit treason, misprision of treason, murder, or felony, shall, notwithstanding, enjoy her dower, a point which had been attempted in former parliaments in cases of felony, but without success.⁴ The present act, as far as concerned treason, was repealed a few years after, as will be seen presently.

Finally, respecting prosecutions, it was enacted that no person should answer for any of the before-mentioned treasons, by open preaching of words only, unless he was thereof accused within thirty days after the open preaching or words spoken; the accusation to be made to one of the king's council, a justice of assize or of the peace; and if the accusers happened to be out of the realm during the thirty days, then the party was to be accused within six months.⁵ Further, it is enacted, that no one shall be indicted, condemned, or convicted for any treason, petit-treason, misprision of treason, or for any words before specified, unless he be accused by two sufficient and lawful witnesses, or willingly, without violence, confess the same, concerning which last provision we shall say more hereafter.

At present we shall make a remark upon one article of that clause of the statute (*a*) which takes away clergy from those who are convicted "*of break-* Housebreaking.
ing of any house by day or by night, any person being then in the same house, and thereby put in fear and dread."

(a) 1 Edward I., c. xii. Then came the 39 Elizabeth, c. xv., and 3 William and Mary, c. ix., and other acts, all now repealed. The stat. 7 and 8 George IV., c. xxvii., wholly repeals the stat. 23 Henry VIII., c. i., and so much of the stat. 1 Edward VI., c. xii., as relates to housebreaking, and wholly repeals the stat. 39 Elizabeth, c. xv., and 3 William and Mary, c. ix., and 10 William III., c. xii., *vulgo*, stat. 10 and 11 William III., c. xxiii., and 12 Anne, stat. 1, c. vii.

¹ Sect. 14.

² *Ibid.*, 16.

³ Sect. 19.

⁴ *Ibid.*, 15.

⁵ *Ibid.*, 17. *Vide* vol. iii.

These words, upon the face of them, appear to have enacted a nullity; for, as the breaking of a house by day or by night, though anybody should be put in fear, is not in itself a felony, it stands in no need of clergy, and the taking it away is in effect inflicting no penalty at all: however, it is not to be supposed, that an act made upon such full consideration as this seems to have been would have contained a sentence that was neither law nor sense, in so material a point as this: and whatever may be the modern construction of these words, they certainly, at the time, bore a meaning entirely consonant to the notions of law then prevailing. It is most probable that the parliament here meant to take away clergy from *burglary*; the description of which offence, we have seen, was in early times very large, and was not yet contracted to the precise compass in which it now is: and at the time this act was made, that offence might, in the minds of some, be sufficiently described in the words of the statute. The breaking a house by day or by night was, as before appears, in the reign of Edward III., burglary,¹ though nothing was taken; and, notwithstanding Fitzherbert, in his abridgment of that case, has said it must be *with an intent to take away goods*, that requisite is not in the original report, but was added by himself, and might, perhaps, be only his own opinion, or at most only the opinion of his time. As to burglary being in the night only, the first determination which expressly and finally says that it shall not be considered as such, unless the breaking be by night, is a case in 4 Edward VI., three years after this act:² if so, the breaking here described, without anything more, comprehended a burglary as then understood; and probably the specifying whether by day or by night was to obviate the doubts which, most likely, long subsisted, before it was solemnly agreed that it must be by night.

But soon after this statute, this offence began to be more expressly settled and defined. After the determination in 4 Edward VI., which confined it to the night, we find a writer of Queen Mary's time expressly saying, that there must be a *felonious intent* to rob or murder; as also, that it must be in the *night*.³ When burglary was defined in this manner, the statute 1 Edward VI., c. 12, was de-

¹ 22 Ass., 95; Fitz. Cor., 264. Vide vol. iii.

³ Staunf., lib. i., c. 24.

² Bro. Cor., 185.

frauded, as it were, of its subject; and as the words no longer expressed any existing felony, they took away clergy from none. But that such a provision might not be vain and useless, the courts, to whom are given the oracles of the law, have since thought proper to supply by construction the defect which had thus accidentally been brought on the statute. They argued, that, the *breaking a house by night*, here certainly meant, that *breaking and entering by night with intent to commit felony*, which is now called burglary; and that, as breaking a house by day is in itself no felony, therefore the breaking here meant is such a one as is attended with a *stealing* in a house after the breaking. In this manner were two crimes raised by construction in the place of one originally intended, upon which the statute might have its effect to take away clergy.¹

The next statute which enacts any penalties is the Act of Uniformity, 2 and 3 Edward VI., c. 1, which inflicts several punishments on offences against the Book of Common Prayer. Thus it is ordained, that if any minister refuse to make use of this book, or use any other, or shall preach or speak anything in derogation of it, and shall be thereof convicted by verdict, by his own confession, or by *the notorious evidence of the fact*,² he shall forfeit the profits of such of his spiritual benefices as the king pleases for a whole year, and suffer imprisonment for six months; for the second offence, shall be deprived *ipso facto* of all his spiritual promotions, and be imprisoned a whole year; and for the third offence, be imprisoned during life. And if he has no benefice or spiritual promotion, he shall for the first offence, be imprisoned for six months; and for the second offence, during life. So far of the clergy.

Offences against
the Common
Prayer.

Again, if *any person whatsoever* shall, in any interludes, plays, songs, rhymes, or by other open words, speak anything in derogation of this book; or shall, by open fact, or open threatenings, compel or procure any minister in any cathedral or church to sing or say any prayers, or

¹ The statutes which take away clergy from *burglary*, and from *larceny in a house, with a breaking*, and *without a breaking*, create much confusion. [See the 5th and 6th Edward VI., c. 9, *post*, as to stealing in a dwelling-house.]

² We have before seen that this was legal evidence in the canon law. *Vide ante*.

minister any sacrament, otherwise than in this book; or shall interrupt any minister in such singing, saying, or ministering, he is to forfeit for the first offence £10; for the second offence, £20; for the third offence, all his goods and chattels, and to be imprisoned during life; and if the £10 is not paid in six weeks after conviction, he is to be imprisoned for three months; and if the £20 is not paid in the same time, he is to be imprisoned for six months instead thereof: all these offences to be determined either at the assizes or sessions, with liberty to every archbishop or bishop to be associated to the justices. The indictment must be at the next sessions or assize; and the lords of parliament are to be tried for these offences by their peers. The jurisdiction of bishops is not hereby taken away; but they are to inquire and punish such offenders by ecclesiastical censures, so, however, as no one be punished both by the spiritual and temporal court for the same fact.

The next penal statute was 3 and 4 Edward VI., c. 5, against unlawful assemblies; an act which was occasioned by the late riots in many parts of England, and which provided some very heavy penalties to prevent the like disorders (a). It was made high treason for twelve persons or more, being assembled together, to attempt to kill or imprison any of the king's council, or to alter any laws, and to continue together for the space of an hour, being commanded by a justice of peace, mayor, sheriff, or the like, to depart. It was made felony for twelve persons to practise to destroy any park,

(a) This act affords an illustration of the remote and often indirect causes which operate in producing alterations of the law. The riots alluded to by the author were chiefly caused by the late sudden changes in religious worship, the confiscation of colleges, and other similar measures; and the statute applied to assemblies with intent to alter any laws, and expressly provided that it should apply to any assemblies with reference to religion. Its effect was to enable the crown to exercise military force to disperse the rioters; for it declared their offence to be high treason, the essence of which is attempting to levy war against the crown. War thus levied, that is, actual rebellion, would justify the exercise of martial law, if really required to suppress it; and martial law was freely exercised in this reign on the least occasion of insurrection. Nor was this all. In this reign, at a time when there was no rebellion or insurrection, the king granted commissions of martial law, and empowered the commissioners to execute it as should be thought, by their discretion, most necessary (*Strype's Eccl. Memoirs*, vol. ii., p. 373). This was undoubtedly illegal at common law, unless understood as limited to actual and formidable rebellion. And the object of this statute was to remove that legal difficulty, and allow of martial law or the use of military force against mere rioters, by declaring them felons and traitors.

pond, conduit, or dove-house; or to have common or way in any ground; or to pull down any houses, barns, or mills; or to burn any stack of corn; or to abate the rents of any lands, or the prices of victual; and to continue together an hour, being commanded in like manner to depart. Concerning the provisions of this act, we shall have occasion to speak in the next reign. By c. 15 of the same statute, the publishing any false prophecy upon occasion of arms, fields, and the like, to the intent to make dissension, was to be punished, for the first offence, by one year's imprisonment, and the forfeiture of £10; for the second offence, by forfeiture of all the party's goods, and imprisonment during life. Both these acts, being temporary, were left to expire in a few years. The remainder of the criminal acts passed in this reign are, the 9th, 10th, and 11th chapters of stat. 5 and 6 Edward VI. These are very material laws, and come now under consideration. We shall begin with the last, concerning treason.

This statute enacts certain treasons of the same kind with some made in the reign of Henry VIII.; however, with such qualifications as discover more temper and moderation. If any person, by open preaching, express words or sayings, affirmed that the king or his heirs or successors, as appointed by stat. 35 Henry VIII., c. 1 (being in possession of the crown), was a heretic, schismatic, tyrant, infidel, or usurper, he was, for the first offence, to forfeit all his goods and chattels, and to be imprisoned during the king's pleasure; for the second offence, to lose the issues and profits of his lands during life, and of all spiritual promotions, and suffer perpetual imprisonment; and for the third offence, he was to be adjudged a traitor. But if the same offence was committed by *writing*, printing, painting, carving, or graving, it was made high treason in the first instance. It was also enacted, that if any person rebelliously withheld any of the king's castles, fortresses, or holds, or his ships, ordnance, artillery, or other munitions of war, and did not give them up within six days after proclamation, it should be high treason. It was also provided, in pursuance of stat. 26 Henry VIII., c. 13, and stat. 35 Henry VIII., c. 2,¹ that such treasons, if committed out of the

¹ *Vide ante.*

realm, should be tried by commission in any county ; and outlawry pronounced against such offender, though out of the realm at the time, was to be valid : to which it was now added by this statute, that if such person should, within a year after the outlawry pronounced, surrender himself to the chief-justice of England, and offer to traverse the indictment, he shall be received so to do ; and if he is acquitted by verdict, he shall be discharged from the outlawry and all its forfeitures.

Persons who committed the above offences by open preaching or words, must have been accused within three months. It is moreover declared generally, that persons *convict* of high treason shall forfeit all lands and tenements in which they have an estate of inheritance ; and, in repeal of stat. 1 Edward VI., c. 12, sect. 17, that wives whose husbands have been attainted of treason shall not have dower.¹

The rest of this statute is much in favor of the subject. There is a clause concerning misprision of treason, similar to that in stat. 1 Edward VI., c. 12 ; but the present, by particular wording of it, evidently shows what was the design of these repeated declarations on this point ; for the act says, that the concealment or keeping secret of any high treason shall be deemed and taken *only* misprision of treason, by which it was intended so far to set a limit to constructive treasons. The next clause contains a wise provision concerning witnesses on trials, and is thought to have been made in consequence of what passed on the late trial of the Duke of Somerset, when the oppression attending a contrary way of proceeding had excited a general indignation. It enacts, that no person shall be indicted, arraigned, condemned, convicted, or attainted for any treason that now is, or hereafter shall be, unless he be thereof accused by two lawful accusers, which, so far, seems to be little more than had been ordained by stat. 1 Edward VI., c. 12. But this statute goes further : it directs, that such "accusers, at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that they have to say against the party to prove him guilty, unless he shall willingly, without vio-

¹ *Vide ante.*

lence, confess the same." The particular meaning of this and the other statute of this king, with their effect and consequences, will be considered when we speak of the statute of Philip and Mary, which was supposed to have repealed them.

The stat. 5 and 6 Edward VI., c. 9, next comes under consideration. This act was made to explain the stat. 23 Henry VIII., c. 1,¹ upon which there had arisen three doubts: First, Whether the owner or dweller must not be in the very chamber where the robbery was committed; a doubt that arose from a strict adherence to the notion of a proper robbery, where the taking must be in the presence of the person robbed. Secondly, Whether the offender would lose his clergy if the owner or dweller was asleep; apprehending, probably, that in that state he could not be said to be put in fear, according to the requisite of the statute. Thirdly, Whether a booth or tent in a fair or market, in which dealers used to dwell and sleep during the continuance of such fairs, could be considered as a dwelling-house under that statute. To remove these doubts, it was declared and enacted, that any person found guilty for robbing of a person in any part or parcel of their dwelling-houses or dwelling-places, the owner or dweller in the same house, or his wife, his children, or servants, being then within the same house or place where the robbery and felony shall happen to be committed and done, or in any other place within the precinct of the same house or dwelling-place, shall in no wise be admitted to his clergy, whether the owner or dweller in the same house, his wife and children then and there being, shall be sleeping or waking (*a*). Further, that any one found guilty of robbing a person in a booth or tent in a fair or market, the owner, his wife, his children, or servants, or servant then being within the same booth or tent, shall not be admitted to the benefit of his clergy, but shall suffer death *in such manner as is mentioned in stat. 23 Henry VIII., c. 1*, for robberies done in dwelling-houses, without any consideration whether the owner or dweller in such booths or tents, his wife, children, or servants, being in the same booth, be sleeping or waking. The latter part

Stealing in
dwelling-
houses, etc.

(a) *Vide ante* as to housebreaking or burglary. There were modern statutes upon the subject.

¹ *Vide ante*.

of this act is stated in this particular manner, because, as we shall presently see, there have arisen great doubts whether this stat. 23 Henry VIII., c. 1 (or at least stat. 25 Henry VIII., c. 3, which is a supplement to it,) be now in force; which, upon the present appearance of things in the course of this history, must be answered in the negative, as they were, among other statutes taking away clergy, repealed by stat. 1 Edward VI., c. 12, s. 10, as we have before seen.

But as the doubt concerning these statutes arises upon the next act, namely, stat. 5 and 6 Edward VI., c. 10, we shall proceed to examine that. The preamble recites, that stat. 23 Henry VIII., c. 1, had taken clergy away in certain robberies and burglaries, but extended only to those who were convicted in the county where the fact was committed; and as such felons often carried their spoil into another county, and if they were indicted there for the simple larceny, they had their clergy; that it was for these reasons enacted, by stat. 25 Henry VIII., c. 3,¹ that they should lose their clergy as if indicted in the same county where the robbery or burglary was committed. Then it recites, that stat. 25 Henry VIII. was repealed by a clause in stat. 1 Edward VI., and that since offenders of this kind had enjoyed their former impunity; for redress whereof this statute now enacted "that the said stat. 25 Henry VIII., c. 3, touching the putting of such offenders from their clergy, and every article, clause, or sentence in the same, touching clergy, should, from thenceforth, touching such offences, remain, and be in full force, in such manner and form as it was before the making of stat. 1 Edward VI., c. 12." This is the effect of stat. 5 and 6 Edward VI., c. 10.

It became in after-times a question, founded upon the operation of this statute, whether the whole of stat. 25 Henry VIII., c. 3, and also stat. 23 Henry VIII., c. 1, were not thereby revived. The occasion of this question was as follows: A man was indicted² for wilful burning of a house. This offence, among others, was deprived of clergy by stat. 23 Henry VIII., c. 1, which extended to principals and accessaries before the fact being convicted by verdict or confession, but did not reach the case of persons wil-

¹ *Vide ante.*

² Powlter's Case, 10 Rep.

fully standing mute, and the like ; to remedy which defect stat. 25 Henry VIII., c. 3, s. 2, ousted of their clergy such offenders in those cases, and, after that, made the provision we have before rehearsed concerning persons indicted in one county for goods taken by robbery or burglary in another. Then came stat. 1 Edward VI., c. 12, s. 10, which took away clergy from all felonies, except those enumerated in the act. These are for the most part such as were before deprived of clergy by stat. 23 Henry VIII.; but there is no mention of *wilful burning of houses*, nor of accessaries before the fact. Therefore, as stat. 23 Henry VIII. and 25 Henry VIII. were repealed, and stat. 1 Edward VI., c. 12, had not provided for burning of houses, it was a doubt, in the case above mentioned, by what existing law the offender was ousted of his clergy. It was there contended (and that seems to have been the opinion of Lord Coke) that this stat. 5 and 6 Edward VI., c. 10, revived *the whole* of stat. 25 Henry VIII., and consequently, that wilful burning being named in the first clause among the offences enumerated in stat. 23 Henry VIII., is ousted by the general words, *every article, clause, or sentence, contained in the same concerning clergy*. However, others¹ are of opinion that, general as these words may seem, they must be restrained to that particular mischief, which, it appears by the preamble, was alone in contemplation to be remedied ; and some² remark, very justly, that the enacting clause in the latter part of it restrains these general words, so much relied on by Lord Coke, to *such offences* as are stated in the preamble.

But there was another ground of argument in the case before mentioned, on which, Lord Coke says, some of the judges relied. The stat. 1 Edward VI., c. 12, having taken away clergy only from principals, the stat. 4 and 5 Philip and Mary, c. 4, was made to take it away from accessaries before in the same offences ; but this statute, moreover, takes it away from accessaries before in *wilful burning*. Now some of the judges, says Lord Coke, thought this solved the difficulty, and gave an interpretation to the former acts. For if the principal should have his clergy, it would be absurd, and what was never seen in our law, that clergy should be taken from the accessory ;

¹ Among whom are Lord Hale and Sir Michael Foster.

² *e. g.* Sir Michael Foster.

and, secondly, it would be in vain to take away clergy from the accessory, and leave the principal to have his clergy; for if the principal had his clergy before judgment, the accessory should not be arraigned. And this Sir Michael Foster thinks was the real ground upon which that determination rested; so that, upon the whole, he is of opinion that both 23 and 25 Henry VIII. were repealed by stat. 1 Edward VI.; that the stat. 5 and 6 Edward VI., c. 10, revived stat. 25 Henry VIII. only *in part*, for the purpose therein mentioned; that, therefore, both stat. 23 and stat. 25 Henry VIII. continue otherwise repealed; and that the stat. 4 and 5 Philip and Mary put the matter out of doubt with regard to *arson*.¹

Whatever ingenuity there may be in this way of reconciling the repugnance of statutes *when they are made*, and allowing this to be a probable inference from the stat. 4 and 5 Philip and Mary; yet it is very difficult to imagine that the legislature, having in contemplation to take away clergy from *principals*, should take it only from *accessaries* expressly, and leave it to legal construction to make the same conclusion as to *principals*; a method hardly suitable to the precision and determination of a legislative act. When we look back to the form and history of these statutes, we find a want of consistency in the parliament at different times, which only increases the obscurity. The stat. 5 and 6 Edward VI., c. 9, seems, from the language of it, to consider the stat. 23 Henry VIII. as still in force; for it says, it *hath been* doubted respecting that statute in some points, and therefore provides for the explanation of those doubts: whereas, had that statute been looked on as repealed, if any doubts upon it had been thought worthy a parliamentary exposition, or rather, if it had been thought proper to re-enact any of its provisions, that statute, it should seem, would have been spoken of in another tense, namely, that it *had been* doubted. If the parliament entertained an opinion that stat. 23 Henry VIII. was then in force, it must have been founded on the next chapter of stat. 5 and 6 Edward VI.; which being thought to revive *in toto* stat. 25 Henry VIII. (an act supplementary to stat. 23 Henry VIII.), thereby also revived stat. 23 Henry VIII., which opinion, we have above seen, was held by

¹ Fost., 331 to 336.

Lord Coke many years after. Nor is it any objection to this supposition, that the reviving statute of 5 and 6 Edward VI. is placed in the statute-book subsequent to the explanatory act;¹ as there are many instances in this reign where acts that are later in point of time are placed before former acts of the same session.²

However the parliament might have formed their opinion on this point at the time, they soon afterwards thought differently; for early in the next reign, it will be seen, there happened a case which called upon them to make, as it were, a decision on this question. They passed a special act for the purpose of taking away clergy from an accessory before the fact in murder; which offenders, as we have seen, are not deprived of that privilege by stat. 1 Edward VI., c. 12; and they thereby seemed to declare that stat. 23 Henry VIII., which had provided for this case, was not then in force. Pursuing the same idea, the legislature made an act some few years after, by stat. 4 and 5 Philip and Mary, to take away clergy from accessories before in all the offences where it was taken from principals by stat. 1 Edward VI., c. 12, and also from accessories in arson; in which this statute is very particular: for though it was intended evidently as a supplement to stat. 1 Edward VI., yet it rather deviated from that, and pursued the words of stat. 23 Henry VIII., which was at the same time regarded as a law not then in force; and by taking clergy from accessories in arson, when no statute in force took it from the principals, created the above-mentioned doubt; and at length furnished, as it is thought, the resolution of it. Thus, in every point of view, these statutes are involved in obscurity; and the main and only question which renders the discussion of the point interesting, can be solved no otherwise than by the assistance of refinement and conjecture.

To return to the order of time from which we have digressed, namely, stat. 5 and 6 Edward VI., c. 10, of persons committing a burglary or robbery in one county, and flying with the thing stolen into another; which leads us to mention another act made for the like furtherance of criminal justice, and

¹ Cap. 9 and cap. 10.

² Stat. 5 and 6 Edward VI., c. 3, of holidays and fasts, was introduced, and passed both Houses before the Act of Uniformity, cap. i.

the removal of like impediments: this was stat. 2 and 3 Edward VI., c. 24. The preamble of the act states two defects of the law. First, that where a person, who was feloniously struck in one county, died in another, a lawful indictment could not be taken in either; for the jurors of the county where he was struck could take no knowledge of the death; nor could those where the death happened, for the same reason, take cognizance of the stroke: so that there was no way of punishing such offenders, neither by indictment, nor, as the statute says, by appeal. The second was, where thieves who had robbed or stolen in one county, conveyed their plunder into another: in which case, though the principal was attainted in one county, yet the jurors of the other could take no cognizance of such attainder; and therefore the accessory went unpunished. It appears, by a case mentioned in the last reign,¹ that the second defect here stated was an obstacle to justice; and however they might *try* a robbery or murder, which was not complete in either county, by a jury of two; and though an *indictment* might be found of such *stealing*; yet there is no case which had yet warranted an *indictment of killing*, where the stroke was in one county, and the death in another; but there is an express determination in the reign of Henry VII. that though such a murder might be prosecuted by appeal, it could not by indictment.² To remedy these defects, and remove all doubt, it was enacted, as to the first, that the jurors of the county where the death happens may inquire, and an appeal may be brought, of the stroke in another; and in the second case, that an indictment against an accessory shall be as valid as if the principal offence had been committed within the same county. The commissioners before whom the indictment is taken are to write to the *custos rotulorum* where the principal was attainted or convicted, to certify whether he was attainted, convicted, or otherwise discharged; which certificate is to be under the seal of the *custos rotulorum*; and upon the receipt of it, the justices are to proceed against the accessory as if the principal offence had been committed in that county.

Some few other statutes were made concerning crimes and punishments. The stat. 25 Henry VIII., c. 6, mak-

¹ *Vide ant.*

² *Ibid.*

ing sodomy felony without clergy, being repealed by the general clause of stat. 1 Edward VI., c. 12, was revived by stat. 2 and 3 Edward VI., c. 29. And because it had been doubted whether the clause of stat. 1 Edward VI., c. 12, which takes clergy from those stealing horses, geldings, or mares (*a*), inflicted the same penalty on those who stole *one* horse, gelding, or mare, it was declared by stat. 2 and 3 Edward VI., c. 33, that it should (*b*). This singular scruple was entertained in consideration of this being a penal law, but the like had never been countenanced in cases regarding property; for the statute of Gloucester, giving an action of waste against one who holds for a term of years, had always been construed to extend to a holding for *a year*.¹

There was a law made to punish offences committed in churches and churchyards by riotous and outrageous quarrels, as then often happened between the reformed and those of the ancient religion. Such offenders are considered in three different lights by this act, and differently punished. First, it is enacted by stat. 5 and 6 Edward VI., c. 4, if any person, by words only, quarrel, chide, or brawl in any church or churchyard, he shall, if the offence be proved by two lawful witnesses, be suspended, if a layman, *ab ingressu ecclesiæ*; if a clerk, from the ministration of his office, at the discretion of the ordinary. Secondly, if any one smite, or lay violent hands upon another, he shall be deemed *ipso facto* excommunicate. And thirdly, if any maliciously strike with a weapon, or draw a weapon to the intent to strike such person, and be convicted by verdict of twelve men, or his own confession, or by *two lawful witnesses*, before the justices of assize, of *oyer* and *terminer*, or of the peace, in their sessions, he shall have his ears cut off; and if he has no ears, says the statute, he shall be marked in

Brawling.

(*a*) It was held that foals and fillies were within the stat. 2 and 3 Edward VI., and included in the words horse, gelding, or mare. Held, therefore, that evidence of stealing a mare filly supported an indictment for stealing a mare (*Rex v. Welland, R. & R. C. C.*, 494).

(*b*) Both these acts were repealed (with 31 Elizabeth, c. xii.) by 7 and 8 George IV., c. xxix. The stat. 7 and 8 George IV., c. xxvii., wholly repeals 2 and 3 Edward VI., c. xxxiii., and also repeals so much of the stat. 37 Henry VIII., c. viii., 1 Edward VI., c. xii., and 31 Elizabeth, c. xii., as relates to the subject.

¹ Plowd., 467.

the cheek with a red-hot iron having the letter F therein, that he may be known for a *fray-maker and a fighter*; and shall moreover be deemed *ipso facto* excommunicate.

Before we quit this subject of penal law, it will be proper to mention a provision made at the beginning of this reign with regard to clerks-convict, which punished vagrancy, as we have before seen, with slavery. It was enacted by stat. 1 Edward VI., c. 3, that no clerk-convict should make his purgation, but should be a *slave* for one year to him who would become bound, with two sureties in £20 to the ordinary, to the king's use, to take him into service; and he was then to be treated as vagabonds were directed by that act to be treated in the like case. Again, a clerk attainted or convict, who by law could not make his purgation, might be delivered by the ordinary to any man who would become bound, with two sufficient sureties, to keep him as a slave five years, to be used as a vagabond; and every person to whom such a one was adjudged slave might put a ring of iron about his neck, arm, or leg. This extravagant punishment, especially under so hateful an appellation as that of slavery, was ill borne by the spirit of the nation, and was therefore repealed by stat. 3 and 4 Edward VI., c. 16.

We shall hereafter speak of the three statutes of Edward VI. and Mary concerning witnesses in cases of treason (*a*). It is the opinion of Lord Coke, though perhaps not well founded, that two witnesses were required on a trial of high treason at common law. Whether this supposed rule had been violated in some recent instances, or, as others think, and history proves, that one witness or no witness had been held sufficient to prove this, whatever might be the occasion, it was ordained by stat. 1 Edward VI., c. 12, and by stat. 5 and 6 Edward VI., c. 11, that no person shall be indicted, arraigned, convicted, or attainted, unless he be thereof accused by two sufficient and lawful witnesses, as the first statute says, or two, as the latter expresses it; to which it is added by the latter statute that they shall, upon the arraignment, if living, be brought in person before the accused, to avow and maintain what they have to say.

(a) Because a priest was tried by jurors and not by witnesses (*vide ante*, vol. iii.; *Plowd.*, 13).

It is beyond a doubt that a new regulation respecting evidence was made by the statutes of Edward VI., independent of the number of witnesses. The very style of the stat. 5 and 6 Edward VI., c. 11, seems to intimate that the bringing before the court the accusers who had been examined before the grand jury was something new; for it enacts with some earnestness and precision that the said accusers, at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, to avow and maintain that they have to say against the said party, to prove him guilty of the treasons contained in the bill of indictment laid against the party arraigned, unless the party arraigned shall willingly, without violence, confess the same.

The statute of Edward VI., in thus enacting that the accusers should appear at the trial, legitimated a testimony to which before there lay a legal objection; and this provision appeared to be equally expedient for the prosecutor and the defendant. The prosecutor on the credit of whose testimony the bill had been found, gained a right of avowing and maintaining what he most likely was alone or best able to testify. The prisoner, who was thus enabled to cross-examine the most formidable of the witnesses against him, being those on whose testimony the bill was found, so far obtained a great advantage. The defence of prisoners in all criminal proceedings seemed to depend on indulgence, and not upon any right to call witnesses; for in stat. 1 Edward VI. c. 11, where a proceeding by indictment before justices of the peace in sessions is directed, it was thought necessary to ordain that the party arraigned shall be admitted to purge or try his innocence by as many or more witnesses, and of as good honesty and credence, as the witnesses which deponed against him.

The new points of learning that had lately engaged the attention of the courts received an accession from the statutes of the last reign. These, whether they related to property or to crimes, furnished fresh objects of litigation and new topics of argument, and drew from the judges several decisions of importance during these two short reigns.

Many questions arose upon leases granted by religious

corporations. These bodies, having seen the destruction of some of their brother societies, were resolved to make the most of their property while they had it; and therefore granted long leases to their friends and their former lessees. The stat. 31 Henry VIII., c. 13, for the dissolution of monasteries, amongst other regulations on this head, had declared all leases void, if made within a year before the beginning of that parliament, with a proviso that where the lessee was at the time in possession under a former lease for years, there the second, if made for that time or more, should be good for twenty-one years. The case of *Fulmerstone v. Steward* arose upon this proviso,¹ and many others of the same kind were agitated in these two reigns; but as the subject of them was temporary, they furnish no inquiry that can engage the curiosity of the modern lawyer.

Another provision occasioned by the dissolution of monasteries, had a greater and more lasting influence. The stat. 31 Henry VIII., c. 13, above mentioned, had permitted the king to take advantage of all covenants and conditions to which the religious societies had been parties, and which it was convenient should go to the crown along with the reversions which were given to it by parliament. But this benefit not extending to the king's patentees and grantees, the parliament took it into consideration, and by stat. 32 Henry VIII., c. 34, gave the same power to them; this was thought a good opportunity to correct an old defect in the law, and to include also common persons, as well as the king's grantees. It was accordingly permitted to all

Assignees of reversions. grantees of reversions to avail themselves of covenants made to their grantors; and lessees in the same manner were meant to have a reciprocal claim upon such grantees as they before had on their lessor. But this was done in such an obscure way, that it was difficult to say whether the whole benefit of the act was not confined to grantees of the king, and of abbey lands. This doubtful wording of the act gave occasion to the case of *Hill v. Grange*, where this matter was fully canvassed, and it was resolved by all the judges of the Common Pleas that the act extended to all grantees of reversions, a construction which it has borne ever since.

¹ 1 and 2 Philip and Mary. Plowd., 102.

The rules that had been long laid down, and adhered to for the government of limitations in remainder, had not so precisely defined the boundaries of these estates, but that on some occasions arguments were found to dispute their authority, or at least to weaken their operation by endless distinctions. This may be seen by the discussion which was raised in *Colthirst v. Bejushin*,¹ where a limitation that seemed to be well supported by the example of former times was contested with some show of reason and law. It was a lease from a religious house to a man and his wife for their lives, remainder to *A.*, their son, for his life; and if he died during the life of the husband and wife, then remainder to *B.*, another of the sons, for life, *si ipse vellet inhabitare, etc.*, which was a common condition in the leases of ecclesiastical persons, who in this manner provided not only for keeping their possessions in tenantable order, but likewise bound their tenants to perform a duty which was incumbent upon churchmen in all instances, namely, to preserve some appearance of that hospitality which was one principal consideration of gifts in mortmain.

The objections raised to this remainder to *B.* were these. It was said that a remainder could not commence on condition; because, if so, it would not pass at the first livery, which was required in every remainder. Again, it was incompatible with the preceding estate; for if it was to commence *then*, namely, when the eldest son died before the husband and wife, it must, in taking effect itself, destroy the particular estate; which was a repugnancy and contrariety that the law would not suffer. These seem to be the chief points relied on, and these were supposed to be sanctioned by the authority of adjudged cases. But all the judges of the Common Pleas were clear that this was a good remainder.

They said this remainder was perfectly agreeable with the principles of law already established: they denied, first, that a remainder ought to pass out of the lessor presently; for if I make a lease for years, remainder for life, upon condition that if he in remainder do not such an act, the remainder shall be void; here, before the condition is broken, the remainder is good; but when the condition is broken, the remainder is out of him, and passes again to

¹ 4 Edw. VI. Plowden, 23.

the lessor; which proves that a freehold may, by agreement at the time of the livery, pass from one to another by matter *ex post facto*. Thus, if a lease for life is granted, with remainder to the king, and livery of seisin is made, the remainder does not pass till the deed is enrolled. In *Plessington's* case, in the time of Richard II.,¹ where one condition was, that if the lessor died within the term, the lessee for years should have the land for life, the condition was held good. So in the present case, the remainder to *B.* did not pass out of the lessor till *A.* was dead, and then it passed by virtue of the original words annexed to the livery. But it was not to take effect till after the death of the husband and wife, for that is the plain and obvious sense of "then;" and they agreed, that if it was to be construed in the sense given by the counsel, the remainder should be void.

It was said by Hinde, justice, that this remainder did not depend upon a *condition*, as had been argued, Conditions and limitations. but on a *limitation*; for the words to make a condition are such as restrain the thing given; as upon condition that he shall not do such an act: but here the words only *limit* the time when the remainder shall commence, and no ways restrain the thing. The common case of an estate-tail is, that if the donee die without issue, it shall remain to a stranger; which is not a condition, but a limitation. The Chief-Justice Montague agreed with him entirely in this idea, and added, that whether it was called a *condition* or *limitation*, yet he thought the remainder good; for the lawful owner of land, he contended, might give it to what person, at what time, and in what manner he please, so as it was not repugnant to law; and this in question he thought perfectly agreeable to ancient and modern precedents. Of the former kind, he quoted one of those common cases in the reign of Edward III. where, for the assurance of a lessee for years, it was usual to make a charter of feoffment, on condition that if the lessee was disturbed in his term, he should have the fee. And he called to their mind a case which was mentioned in the reign of Henry VIII. of a fine to pass lands in tail, with condition to bear the conusor's standard; and on failure, that the land should remain to a stranger.² He said he was

¹ 6 Rich. II. Fitz., Quid juris, 20.

² *Vide ante.*

counsel in that case; and though Fitzherbert expressed surprise at a fine being levied on condition, yet the remainder was not considered as anything remarkable. He was of opinion that the remainder in the present case did pass out of the lessor at the time of the livery, although it did not vest in *B.* till the death of *A.*; and he held it in abeyance until the performance of the condition, upon the possibility that it might be performed. Thus, if land was given to a married man, and to a married woman, and the heirs of their two bodies, the fee-tail passed out of the donor immediately by reason of the possibility that they might marry; and in the meantime the inheritance was in abeyance. In the same manner, he said, the remainder here was in abeyance till the event on which it was limited had happened.

Upon such reasons, the judges agreed in holding this to be a good remainder.¹ The arguments and adjudication on this occasion tended to set in a better light the learning of remainders depending on a contingency; and the distinction between a condition and a limitation afforded a new idea, which was afterwards made great use of in the construction of restrictive clauses in deeds and devises of land.

Whatever doubts might be entertained on conditions that were designed by the parties to operate in destruction of estates, there was one condition created by the legislature which infallibly annihilated an estate, whether for life or entail, and gave a right of entry to the person next entitled in remainder or reversion. This was the alienation of a woman who had an estate from her husband, which, by stat. 11 Henry VII., induced a forfeiture. A case came before the Court of Common Pleas, in 4 Edward VI., which gave occasion to this statute being fully examined and explained; and as it contains some argument upon the new learning of uses, it is on that account deserving of notice. This was *Wimbish v. Talbois*, where a feoffment had been made by Sir George Talbois to the use of himself and wife in special tail; after which came stat. 27 Henry VIII. They had issue, Thomas and William; and then Sir George died. Thomas died, leaving issue, Elizabeth, who married to Wimbish. Afterwards, Wil-

¹ 4 Edw. VI. Plowd., 23.

liam, by covin with his mother, Lady Talbois, brought a formedon *in descendre* against her; she appeared at the first day, and William recovered by *nient dedire*: upon this Wimbish and his wife, Elizabeth, as heir to Sir George, entered by virtue of the stat. 11 Henry VII., c. 20.

It was contended that this entry was not lawful for several reasons. They said that Lady Talbois did not hold such an estate as was described by the act; for, by the first branch of the act, she should have an estate in dower for life, or in tail jointly with her husband, or solely to herself, or to her own use in any lands, tenements, or other hereditaments, of the inheritance or purchase of her husband. Now, admitting her to have an estate tail jointly with her husband, they said it was not *in lands* but only *in use*: and those were two different things. Again, it was not of the inheritance or purchase of the husband, for the *use* was neither, being a new thing, not in being before, and so never in the husband; so that she was not within the first branch. The second branch speaks of the like estates when they came from any ancestor of the husband, which was not pretended to be the case here. And the third branch is, where the estate comes by any person seized to the use of the husband or his ancestors; and they said, she was not within this branch, for the use was appointed by the husband at the time of the estate of the feoffees, therefore she could not claim from them. It was concluded, therefore, that Lady Talbois not being within the terms of the act, no forfeiture could ensue. Further, they contended, that admitting she was, yet the heir in her lifetime could have no right to enter; for the construction of the two clauses relating to the forfeiture was, that the recovery in case of tenant in tail was merely void, and that the issue should enter as if no recovery had been suffered, after the death of the tenant, for then, and not till then, had an heir any right or title; and it was only where the woman was tenant in dower, or for life, that the reversioner, or he in remainder, might enter immediately.

These were the points upon which it was endeavored, ingeniously enough, to take this case out of the statute; but it was held by the whole Court of Common Pleas that this case was within the words of the act; and if not, that it was at least within the equity of it, and that the

entry was lawful immediately, in the life of the tenant in tail.

As to the first point, whether *cestui que use* was within the act, it was admitted by Hales, justice, that an estate in use is mentioned but once in the premises of the statute, *solely to herself or to her own use*; but if that clause speaks only of *cestui que use*, and what follows relative to recoveries had against women, *or any seized to their use*, is only to be referred to that, it could not be denied but the present case was clearly within the words of the statute. It is to be observed, says he, that this act was made within fifteen years after stat. 1 Richard III., which makes the acts of *cestui que use* binding on his feoffees; and perhaps some of the makers of that statute were also at the making of stat. 11 Henry VII., and must have considered the effect of the first statute, by which a recovery was good only during the life of tenant in tail: and so, if stat. 11 Henry VII. did no more than make the recovery void against the issue, it would provide only for that which needed no provision. The statute must be designed to make that unlawful which was lawful before; and as it was meant to have this effect with regard to a tenant in tail in possession, it was equally reasonable, because it was in equal mischief, that it should be construed to have the same effect against *cestui que use* in tail. This latter consideration had always been a reason in our law for extending a statute by equity to such cases as were not within the letter of it. Of this there were many examples. Thus, the stat. Marlbridge, c. 6, though it speaks only of estates for years and feoffments, yet is construed to include a gift for life, or in tail to the issue, for the purpose of defrauding the lord of his ward. The stat. *De Donis* speaks only of three estates' tail, but has been extended to many others. Stat. Westminster 2, c. 3, which directs him in reversion to be received to defend a suit, has been construed to include those in remainder. An action of account given by statute to executors has been extended to administrators;¹ and many other instances were given of statutes construed by equity. From all this it appeared, that a like grievance should by equity be taken to be within the purview of the act.

¹ Plowd., 53.

In all this the Chief-Justice Montague concurred; and with regard to the words of the act, which required it to be of the inheritance or purchase of the husband, he said, that being such as the heir might inherit, was the true legal idea of an inheritance: and he treated with contempt the distinction made between an inheritance and purchase, which had been quoted from Britton, whose book he said contained many errors. For himself, he professed to follow Littleton, which he called the truest and surest register of the grounds and principles of our law; and Littleton says, that not only what a man has by descent, but also what he has by purchase, is an inheritance. Thus, he concludes, the words of the statute are satisfied; for she has an estate in an hereditament (namely, in a use) jointly with her husband, to her own use, of the inheritance of the husband, which is all required by the first disjunctive sentence of the statute.

But if she was not within that, she was within the second disjunctive sentence, *or given to the husband and wife in tail by any person seized to the use of the husband*; for the feoffees being seized to the use of the husband and wife, were seized to the use of the husband (the husband and wife each having the entire use, for there are no moieties between them), and the feoffees were the donors of the estate, after the execution of the possession to the use by stat. 27 Henry VIII., for the parliament could not be said to be the donors, the act being only the conveyance of the land from one to another. He said, it had been long since held, where *cestui que use* and his feoffees joined in a feoffment, that it should be construed to be the feoffment of the feoffees; for they had the greatest authority to give it, even after the stat. Richard III.¹ So if one who was seized in fee, and one who had nothing in the land, joined in a feoffment, it shall be said to be the feoffment of him who has right, and the confirmation of the other. Thus, he concluded, it should here be said to be the feoffment of the feoffees by parliament, and the assent and confirmation of all others; and if it was construed otherwise, it would be attributing to the statute the power of doing wrong to the feoffees, by taking a thing from them and making another the donor of it. Thus, the feoffees were

¹ M. 21 Hen. VII., 32 pl.

the donors; but if they were not, yet Sir George was, unless it should be thought a repugnancy to say he was a donor to himself; and therefore the feoffees more properly were the donors, and then the whole of the statute was satisfied. However, if this case was not within the words, he agreed with the other judges in thinking it within the equity of the statute; and to obviate the objection, that the provision being in restraint of the tenant in tail should be construed strictly, he said it was for the benefit of the common weal, and in advancement of justice; and every statute which is construed by equity, restrains, and is penal to somebody; and he seemed to think the rule of construction was to turn on the statute being beneficial to the greater number.¹

Though no judgment was here given, it was of great importance that the judges concurred unanimously in so solemn opinion to bring this case within the terms of the act; for, since most estates in the kingdom were conveyed to a use, this provision would otherwise have become almost wholly abortive. The anxiety they felt to compass this by a literal construction, led them into some subtlety and refinement; and though there can be very little doubt what the makers of the act intended, yet the wording of it being liable to some cavil, it seemed a safe and sensible resolution to supply the defects of it by equity.

In these two reigns some decisions were made on uses, which tended to show the effect the late statute had upon them. It seemed a doubt, Of feoffees to a use. when that statute had ordained that *cestui que use* should thenceforward be seized of the land and freehold, as he before was of the use, whether any seisin of the freehold remained in the feoffees. The courts seemed inclined to think the feoffees still possessed of the same estate and power they had before the act; so that both the *cestui que use* and the feoffee having a freehold, and both having an equal power over the same freehold, the difficulties of that sort, which were experienced after the stat. 1 Richard III., were felt after the stat. 27 Henry VIII.

The following are some instances where this point was debated. A man made a feoffment in fee to the use of W. and his heirs, till A. paid £40 to W., and then to the

¹ Plowd., 42.

use of *A.* and his heirs. *A.* paid to *W.* the £40. There was a difference of opinion as to the conclusion to be founded on these facts. Some said, that if *A.* entered, he would become *ipso facto* seized in fee; for *W.* being seized in fee by the statute of uses, *A.* would be able to divest that fee, and transfer it to himself under the condition of the deed. Others, on the contrary, were of opinion, that the payment and entry of *A.* had no effect without an entry by the feoffees. Between these two opinions Brooke has struck out a middle course, as an expedient to salve difficulties; he thought that it would be best for *A.* to enter in the name of the feoffees, and then *quâcunque vitâ datâ*, the entry must be good, and he would become seized according to the terms of the deed. To this he added, that a use might change from one to another by some act or circumstance, *ex post facto*, as well since as before the statute.¹

Another question arose respecting the interest of feoffees, in the case of *Stephen Davis*. A tenant for life, and the tenant in tail next in remainder in use, had levied a fine of the land, which had afterwards been conveyed to the king; the feoffees to the use presented a petition of right; and here two points were made in arrest of judgment on the petition. First, that the fee-simple of the use was legally conveyed by the fine, and was now in the king; and if it was the case of a common person, he could not enter; because not being seized of a fee-simple, as he was before the alienation, of what estate could he be in? Secondly, they said that all interest and right of the feoffees, which was not to their own use, was taken away by the statute. There does not appear to be any decision of these points at this time;² and it will afterwards be seen, that all these positions received some qualification.

The rigid opinions maintained in the last reign against *covenants to convey uses* were beginning to be somewhat tempered.

In the short reign of Edward VI., some steps were taken towards effecting the intended reformation in our ecclesiastical laws. We have seen that Henry VIII. was empowered by statute to appoint commissioners to reform the ecclesiastical laws then in

Reformation of
the ecclesiastical
law.

¹ Edw. VI. New Cases, 136.

² 7 Edw. VI. Dyer, 88, 109.

force. A commission was issued under that act, and the persons appointed to execute it had met and made some progress in the undertaking; but after the statute of the six articles, the reformation of the ecclesiastical law dropped with that of religion; and Cranmer, in a letter dated 1545, speaks of this scheme as then forgotten and quite laid aside.¹

We have seen there was an act of Edward VI. to empower thirty-two persons, named by the king, to undertake this work, which, it was intended, should be finished in three years. But this also was retarded by various changes in affairs, and it was not until November, 1551, that a commission was issued to eight persons to prepare the matter for the revision of the thirty-two; a method which was thought more likely to expedite the undertaking than if it had been left to the greater number. These eight consisted of some bishops and doctors of divinity, two doctors of the civil and canon law, and two common lawyers. As two of the three years had elapsed before they set out about executing the commission, they prayed to have longer time; and they had three years more offered them by act of parliament, to which act, however, the king never gave his assent, owing, as it is thought, to the forwardness in which the work was believed to be, and that a further continuation of time was not necessary. The work was prepared by February, 1552, and a commission was granted to thirty-two persons, of whom the former eight were a part. It consisted of eight bishops, eight divines, eight civilians, and eight common lawyers. They were to revise, correct, and perfect the work, and then present it to the king. For this purpose they divided themselves into eight classes, four in a class; every one of these was to prepare his corrections, and communicate them to the rest. Thus was the work carried on and completed; but before it received the royal confirmation, the king died, and the project died with him. It was not afterwards revived, nor has anything of the kind been attempted since. The old canons still remained in force by usage and the statute of Henry VIII., and so they continue to this day.²

However, this compilation was printed in the reign of

¹ Burn. Ref., vol. ii., 185.

² Ibid., 185, 186.

Queen Elizabeth, under the title of "*Reformatio Legum Ecclesiasticarum*." In the preface it is said that Cranmer executed almost the whole volume himself; which justified the opinion before entertained of him, that he was one of the best canonists in the kingdom. Sir John Cheek and Dr. Haddon had been employed to put it into Latin; in performing which they imitated the style of the Roman laws with a happiness far beyond the composers of the pontifical law.¹

After the taste we have already had of the law and practice of the ecclesiastical courts,² we feel some curiosity to see what were the ideas of the reformers upon the same subject. On a view of their scheme of reformation, it appears that they worked upon the old materials, and were not precipitate in making any alterations of consequence. The canon and civil law, and the provincial and legatine constitutions, were still to be the groundwork of our ecclesiastical law. But these underwent some change and modification in certain articles.

The law of matrimony, adultery, and divorce, was intended to be almost wholly altered by the new scheme. For this purpose, in the first place, it was expressly laid down that no promise or contract should be binding, but such as was made in the following way: The minister

was to publish the intended marriage on three
Of marriage. Sundays, or at least feast-days; at the end of

which the man and woman were to be present in the church while the ceremony, lately ordained, was performed: so that all the canonical learning about espousals and pre-contracts was at once done away. But to prevent the ill consequences that might follow to young women who had yielded to the promises and solicitations of men, the penalty of excommunication was denounced against those who were guilty of violating a woman's chastity: and if they would not consent to marry the woman, the ecclesiastical judge was to give to her a third part of his goods: if the goods could not be divided in that manner, he was to condemn him to take care of the child, and to undergo such penance as the judge thought necessary to expiate the scandal.

The marriage of children and orphans was declared

¹ Burn. Ref., vol. ii., 185, 186.

² Vide vol. iv., c. xxx.

void, if not contracted with the consent of their parents and guardians; but if these withheld their consent without sufficient reason, recourse might be had to the ecclesiastical judge, who was to decide on the propriety of the matter. A woman at twelve,¹ and a man at fourteen; and not before, might marry. Marriage might be celebrated at all seasons; but it was to be in the parish where one of the parties inhabited, or the minister would be excommunicated. At the time of the ceremony any one might interpose, and show cause why the marriage should not take place; and upon giving security to prove the cause within a month, or make satisfaction for all the expense of preparation for the marriage, the ceremony was to be delayed for that time; and neither party was to contract marriage during that month, under pain of excommunication, and compensation to the party so deserted. If there was a secret inability for the marriage state in either party, the marriage was deemed to be null; otherwise if it was known. Deaf and dumb persons might marry, and those who were mad, in a lucid interval. There was to be no marriage with infidels. With these exceptions marriage was, upon this new scheme, allowed to all persons of what condition soever, and might be repeated. But this was not to give license to polygamy; for it directs, if any person had more wives than one, he should retain only the first, if she would have him for a husband, and dismiss all the others with their dower, and make satisfaction to the church for his offence. The women also were to be punished, if they were conscious of the man having more wives than one.

After the marriage was concluded, if quarrels and bickerings arose between them, and they were unwilling to continue together, they were to be compelled by ecclesiastical censures to accommodate differences, and live in matrimonial harmony, unless those differences were of such a nature as we shall hereafter see were grounds of a divorce. It was laid down, that any marriage contracted under the influence of force or fear should be void. Thus far of marriage in general.¹

The degrees within which marriage was prohibited were those contained in Leviticus, ch. xviii. and xx.,

¹ Reform. Leg. Eccles., 37-43.

which they said was a rule not confined to the Jewish nation, but, like the Decalogue, was to have authority with all Christian men. They therefore declared it to be impiety in the Roman pontiff to arrogate to himself the power to dispense with these divine prohibitions. As to the construction of these prohibitions, they said, many were only put for examples, and we must supply others, which stand in precisely the same situation: thus, for instance, if a son is not to marry his mother, so a daughter is not to marry a father. They therefore laid down two rules: first, that wherever males were mentioned, the same should be understood of females in the same degree of propinquity: secondly, that husband and wife made but one flesh; so that in whatsoever degree of consanguinity a person was related to the one, he was related in the same degree of affinity to the other. They retained the old notion of the canon law, and considered any illicit connection as creating an affinity the same as marriage; and they held the impediment of affinity to continue after the death of the party. But they declared that all spiritual cognation was an invention not authorized by Scripture, and therefore should no longer be an impediment to marriage.¹

The reformers of our ecclesiastical law prescribed very heavy penalties in case of adultery; founding this severe measure on the Jewish law, which directed such offenders to be stoned to death: and on the civil law, which punished them capitally. When a minister was convicted of adultery, fornication, or incest, his goods, if he was married, were all to devolve to his wife and children; if he had no wife nor children, they were to be distributed to the poor, or applied to other purposes, at the discretion of the ecclesiastical judge: if he had any benefice, he was to forfeit it, and to be incapable of taking another: he was likewise to be sent to perpetual exile or imprisonment. A layman convicted of adultery was to restore to his wife her dower,² and also half his goods; he was likewise to be condemned to perpetual exile or imprisonment. A wife, in like manner, if convicted of adultery, was to forfeit her dower, and all claim she had by law, or prom-

¹ Reform. Leg. Eccles., 44-47. *Vide ante.*

² The word in the original is *dos*; and, as such, is ambiguous in this passage, but less so in the following.

ise, on the effects of her husband; and was to suffer perpetual exile or imprisonment. Moreover, in such case the innocent party might contract another marriage: this second marriage they thought justified by the words of Christ, who made an exception of the case of adultery. However, they recommended that the guilty party should in charity be invited by the innocent to return to the conjugal state; and at no rate should be allowed to marry again. None was to put away his wife for adultery, and take another, till the ecclesiastical judge had heard and determined the matter; and if he did, he lost all right of proceeding against his wife. The judge, when he condemned the one of adultery, was to pronounce a liberty to the other to marry again: there was to be a time limited for such second marriage, as a year, or six months: during which, if he did not return to his first wife, he might take another. If one of the parties withdrew from the other, and, after entreaty and remonstrance, would not submit to cohabit, the other might, upon authority of the ecclesiastical judge, have liberty to marry. If the absent person could not be found, then process was issued, and a term of two or three years was to be fixed by the ecclesiastical judge for him to appear and show good cause of his absence; which if not done, the other party was absolved from the tie, and might marry again; and if he afterwards appeared, he was to be confined to perpetual imprisonment. The ecclesiastical judge might proceed in the same manner, where the absence was on some lawful calling, if nothing had been heard of him for some time; and the other party might, in like manner, marry: however, if the absentee could give good reason for his being detained, his wife would be obliged to receive him again: if he could not show good cause of absence, he would be punished with perpetual imprisonment, and the second marriage would be good.

If there was irreconcilable enmity between two married persons, so that one had plotted the other's destruction, it was a cause of divorce. If a husband treated his wife with severity, the ecclesiastical judge might use remonstrances, and then compel him to give security to treat her well. If this did not succeed, it must be attributed to irreconcilable enmity, and was therefore a good cause of divorce. The judge might proceed in like manner with

women who were obstinate and rebellious. In all these cases the innocent party might marry; but the offender would be committed to perpetual imprisonment.

The reformers laid it down, that an incurable disease contracted by either party should not be a cause of divorce. During a suit with his wife on the ground of adultery or ill-treatment, the husband was required to support her according to her condition. If the husband failed in a suit against his wife for adultery, he was to forfeit to her half his goods, and was afterwards to have no power to dispose of the goods so forfeited: the wife, if she failed, was to lose her dower, and all claim she had upon the husband's effects. If such action was brought by any stranger, he would not be admitted to church till he made compensation to the party calumniated. If the party convicted of adultery could prove the other to be equally so, they would both suffer the same punishment, and the marriage would continue still in force. The separation *a mensâ et toro* was entirely taken away by the reformers, as productive of great abuses and scandal in the marriage state.¹

While the reformers were projecting this change of the old law of separation *a mensâ et toro*, an incident happened respecting a distinguished personage, that led to the public discussion and decision of this very point. The Marquis of Northampton had been separated from his wife on account of her adultery. This happened in the reign of Henry VIII., when it was considered, whether some relief might not be contrived for the innocent party, to whom separation was but a very partial, and sometimes a hazardous redress. In the first year, therefore, of Edward VI., a commission of delegates was directed to ten persons, of whom some were bishops, to try whether the marchioness was not by the word of God so lawfully divorced that she was no more the marquis's wife, and whether he might not thereupon marry again. As this was a new case, the delegates, to investigate it thoroughly, took longer time to give their judgment than that nobleman chose to wait; for he, in the meanwhile, was solemnly married again. As the first marriage still subsisted in law, this gave great scandal, and he was put to answer for it before the council; where he defended what he had done by saying, that

¹ Reform. Leg. Eccles., 47-56.

all ties between him and his former wife were discharged by the law of God; that making marriages indissoluble was a popish contrivance to get money; that separation only led to temptations, and the like. However, he was by that tribunal enjoined to part from his new wife till the delegates had given sentence, and then further order should be made in it. To this the marquis consented. In conclusion, after a long inquiry, the delegates, in the spirit of the designed reformation, actually determined in favor of the second marriage. Upon this the marquis was suffered again to cohabit with his wife; but afterwards, to make all sure, he thought it advisable to get this sentence confirmed by a special act of parliament.¹

This was a severe blow upon the canon law; and it was thought proper, in Queen Mary's reign, to repair the breach that had thereby been made. An act was brought in to repeal the statute made to confirm this marriage. It was much debated in the House of Commons, and was at last, by various alterations, so qualified, that it threw no imputation on the parties, but only declared that, in that particular case, the divorce was unlawfully made. The act at first probably contained a clause against all divorces of the same kind; many of which, no doubt, had been made in consequence of this precedent.²

The reformers designed some alterations in the law of wills,³ the principal of which consisted in the following particulars. They allowed the liberty Of wills. of making a will to all persons of either sex, and of every condition; but they excepted from this general authority all wives, *servi*, and minors under fourteen years, heretics, and those condemned to death, or perpetual exile, or chains; which two latter punishments, we have seen, were very commonly inflicted in this new system of jurisprudence. Those who did not dismiss their concubines before they were *in extremis*; those who had two wives, or two husbands; those convicted of *famosi libelli*; those who were prostitutes or procuresses, unless they had undergone temporal punishment for their crimes; those guilty of usury, unless they had refunded or made satisfaction, or taken measures for so doing; all these were prohibited from making wills. However, they allowed persons who

¹ Burn. Ref., vol. ii., 53, 54.² Burn. Ref., vol. ii., 237.³ *Vide ante.*

kept their concubines, or had two wives, or two husbands, to dispose of their goods in *pias causas*; and the like indulgence was given to usurers who had made no restitution, and to those who had been prostitutes or procuresses.

The articles which they reckoned within the description of *piæ causæ* were these: in addition to the relief of prisoners, and of the poor, the assistance of orphans, widows, and afflicted persons of all sorts, as was required by our old law, they particularly pressed these objects: to promote the marriage of young women, the support of students in the universities, and the reparation of highways. If any disposition rather of a superstitious than pious nature was made, the bishop was to interpose his authority, and see that it was applied to some *piæ causæ*.¹

The division of the deceased's goods, whether by will or without,² was required to be in this manner. If he had a wife and children, a third was to go to the wife, a third to the children, and the other third was to be at his own disposal. If he left no will, the wife and children were to take their thirds, and the administrator distribute the other third. If there were no children, the widow had half, and the other was to be at his own disposal; or, if he died intestate, at the disposal of the administrator; the same if he left children, but no wife. The children were all to take equally, unless the father had ordered it otherwise in his will. If the child died, then his share was to go to his children, if he had any. Thus was the law of distribution, which had been subject to much doubt and difference of opinion and practice, in a fair way of being ascertained, if this scheme of reformation had ever taken place; for it is laid down, that even in case of a will the children were entitled to a third, or a half, which was to be divided equally between them; but the father might, if he pleased, apportion that third or half between them as he liked.

They went on to declare, that no son should be passed over in his father's will, unless he was expressly disinherited in plain terms; and such disinheritance would not be good unless it mentioned some just cause for such a measure. These causes were thus enumerated by our legislators: if a son laid violent hands upon his father; if he had injured him in any signal manner; if he had

¹ *Vide ante.*

² *Ibid.*

prosecuted him for a crime, through malice, and not for the good of the state; if he had laid snares for the life of his father or mother; committed incest with his step-mother or step-father's concubine; if he had calumniated his father's good name or wasted his property; if he had refused to be security for his father. A daughter might be passed over in a will if she had become a common prostitute while the father was offering her a reputable marriage; for if a father neglected his daughter till she was twenty-five years old, without preparing her a proper match, this omission in the parent would absolve the daughter, say these reformers, from any imputation of offence, so as to preclude him from putting her out of his family, or passing her over in his will.

In like manner, a wife was not to be excluded from the husband's will, without some delinquency on her part; as if she had used violence against him, had contrived any ill against him, had attacked his fame or fortune by calumny and false accusations, had exposed his daughter to temptations, or had absented herself from him. Both wives and children, if they obstructed the father and husband in making or altering his will, if they did not protect him when afflicted with disease, nor ransom him when captured; or if they became heretics; they might be passed over, as objects unworthy to enjoy any part of his property.

They declared that the following persons should not be qualified either to become executors, or to take any benefit under a will: heretics; those condemned to death, perpetual exile, or imprisonment; those who kept concubines; those who had two wives or two husbands; those convicted of procuring or publishing *libelli famosi*; procuresses and common prostitutes, and usurers: and the delinquency of the above persons was not to be estimated at the time of making the testament, or the death of the testator, but at the time of taking the executorship, or receiving the legacy.¹

There had always been a latitude in the description of persons to whom the ordinary was to commit administration. We have seen² that this was reduced to some sort of precision by a statute of Henry VIII. and the intended

¹ Reform. Leg. Eccles., 129-135.

² Vide ante.

regulation seems to have this last provision in view. For it says, that when a person died intestate, the wife should be the first to have the administration; in the next place, those who were nearest of blood; and if the judge pleased, he might unite these with the wife in the administration. If there were several in the same degree of propinquity, the judge was at liberty to appoint one or more as he pleased.

Several directions are given for the granting of administration, the payment of legacies, the fees of ordinaries, and the like; most of which seem to correspond with the practice of the ecclesiastical court in former times; and finally this new scheme directs, that in all matters of controversy, upon the numberless questions to which wills were liable, and which were not here ascertained or provided for, recourse should be had to the body of imperial law.

The other great object of ecclesiastical cognizance, the payment of tithes, does not seem to have undergone any considerable change in this intended reformation; the compilers appear to have proceeded, in what they ordained, wholly upon the ideas of our provincial constitutions, many of which are copied almost in the very words. Among other regulations, it requires the late statute of Edward VI.,¹ concerning the payment of tithes, and the old act about *sylva cædua*, to be observed.² There is only one more article of ecclesiastical jurisdiction which we shall mention, and that is *fidei læsio*, that has been so often considered in the various disputes between the spiritual and temporal courts.³ It seems to have been intended by the reformers, that no consideration should be had of the object in question; but that, whether it was of a lay or a clerical nature, suit for the breach of faith should be entertained in this court. They declare, that whatsoever agreements and promises were not fulfilled nor performed, whether there was an oath taken by the parties, or only a strong affirmation made, those who did not keep their faith should be pursued with ecclesiastical censures, and compelled to make satisfaction to the parties who were deceived by their perfidy.⁴

¹ Stat. 2 and 3 Edward VI., c. 13. *Vide ante*.

² Reform. Leg. Eccles., 105-124.

³ *Vide ante*.

⁴ Reform. Leg. Eccles., 208.

Without entering any further into the detail of this projected reformation of our ecclesiastical law, it may suffice to subjoin a brief enumeration of such causes as they meant should be considered as ecclesiastical, and to be heard and determined nowhere but in this court: causes beneficiary, matrimonial, and of divorce; causes testamentary, and for the administration of intestates' effects; for subtraction of legacies, mortuaries, tithes, oblations, and other ecclesiastical rights; for usury, heresy (a), in-

(a) The punishment for which was to be, or might be, death. "It has been said," writes Sir J. Mackintosh, "that the 'Reformation of Laws' indicated preparations for severity against the adherents of the old religion." This statement is chiefly grounded on a text of that projected code which directs that contumacious and incorrigible heretics, after all other means have been exhausted, shall be at length delivered to the court magistrates to "be punished" — "ad extremum ad civilem magistratum allegatur puniendus" (*Ref. seq. de Jud. cont. Hæresis*, c. 3). It is presumed that the punishment must be death; yet in the very last article of the code, which relates to atheists and unbelievers in Christianity, death is denounced against them in express terms: "vitam illis adjudicandum statuimus" (c. 1). The admission of it into another article by mere implication is therefore unreasonable. It is too terrible an enactment to be admitted without express words. If punishment is held to be synonymous with capital punishment by force of this clause, death must be applied to all heresies. If it was intended to confer on the court and magistrates a large discretion in the infliction of inferior punishments for the enumerated heresies, the article is perfectly agreeable to the practice of the powers and the opinions of the times" (*Hist. Eng.*, vol. ii., p. 318). It is unaccountable that so acute an author should have failed to perceive that he answered his own objection, that this was exactly the object of the generality of expressions used; but which therefore must be taken to have included power to inflict the punishment of death in cases considered really to involve the offence of heresy. And this was the opinion of Mr. Hallam. So also the learned Lingard remarks, that no doubt the phrase used involved the power of deprivation of life; "For this we have the testimony of Cranmer himself, who must be the best interpreter of his own language, when he condemned Ann Bocher to be delivered to the civil magistrate, and officially informed Edward that she was to be deservedly punished" (*Wilk. Conci.*, iv. 44). What was the punishment which he prevailed on the reluctant prince to inflict? Death by burning. When he pronounced the same sentence on Van Parris, and gave similar information to the king 'animadversione vestra regia puniendum' (*Ibid.*, iv. 45). What did the word 'puniendum' import? Death by burning. Again, it has been remarked, that a MS. copy which belonged to the archbishop (*Harl. MSS.*, 426), after 'puniendus' is added in the hand, as it is thought, of Peter Martyr, 'vel ut in perpetuum pellatur exilium vel ad æternas carceris depri-matur tenebras' (*Todd*, ii. 384). But it explains that on revision this suggestion was abandoned; for it was omitted in the later and more perfect draft of the laws as they were afterwards completed and finished in King Edward's reign, and were published by Archbishop Parker in 1571" (*Strype*, 134). Moreover, it is to be remembered, that not only in those times generally, but in this reign in particular, it was usual to inflict the punishment of death for heresy.

cest, adultery, fornication, sacrilege, perjury, blasphemy, *fidei læsio*, defamation and scandal; laying violent hands on a clerk; disturbance of divine service; for correction and reformation of manners; accounts of churches and church-wardens;¹ dues owing to churches and their ministers; reparation and dilapidation of churches, churchyards, and other ecclesiastical edifices. In these causes, and their incidents arising from or depending upon them, and in all other causes relating to the correction of sins, the ecclesiastical judge, and no other, was to have jurisdiction to hear and determine.²

No period in the English history furnishes more instances of an irregular and undefined constitution than the reigns of Edward VI. and Mary. King and government. Many of the extravagant proceedings of Henry VIII. are rather to be attributed to wilfulness and a tyrannical spirit. These incentives no longer operated; yet, under the gentle sway of his son and the Protector, the same prerogatives were exercised, with no other difference than that of their motives and objects. The acts of the council seem to have been received with the same acquiescence as those of Henry; and the commons, though not held in the same awe as during his reign, did not, however, show greater spirit in asserting their privileges, or discover any better sense of what extent those privileges were.

So prevailing was the opinion of the great prerogative possessed by our monarchs at this time, that the Scots made it one of the principal objections to marrying their young queen with Edward VI., that all their privileges would be swallowed up by the great prerogatives of the English crown. This notion had so spread abroad, that the emperor, in conversation with the English ambassador, maintained the King of England's prerogative to be greater than that of the King of France.

The first act of the regency appointed by Henry VIII., was to alter the government which that king, under authority of an act of parliament, had made by his will. They delegated all their power to the Duke of Somerset, under the title of Protector. This, however, was thought

¹ *Computus ecclesiarum et æconomorum.*

² Reform. Leg. Eccles., 195.

not sufficient foundation for his authority; and a patent was procured from the young king, by which this revolution was considered as completely confirmed and legal. The duke was thereby invested with regal power, and a council was appointed with whom he was to advise. This usurpation was acquiesced under by parliament and the nation, without any scrutiny into its validity.

The act of Henry which gave the force of laws to the king's proclamations was made to have force during the young king's minority. Of this the Protector availed himself; and proclamations were issued on many occasions where they could be applied to promote the great design of the Reformation. By one proclamation the jurisdiction of the bishops was suspended; while commissioners were appointed, part clergy and part lay, to make a general visitation in every diocese. After this law had been repealed,¹ the Protector still issued proclamations, which, in their nature, could hardly be considered as less than new laws; such as forbidding many ancient superstitions, and making material alterations in the national worship.

Proclamations had, from very early times, been the usual method by which our kings had signified their commands and enforced their authority. They were framed for the purposes of government and of the state. They seemed a necessary part of the executive magistrate's power; and having grown up with the monarchy, they might in those times be looked on with reverence by the people without discovering how nearly they approached to acts of legislation. But the dispensing with positive laws was an act of a more unequivocal kind; and this power was exercised by Edward VI., or rather by the Protector, in more instances than one. The Protector procured a patent enabling him to sit upon the throne, and enjoy those honors and privileges usually bestowed on princes of the blood: this was a plain dispensation with the statute made in the last reign to settle precedency.² On another occasion, when the convocation found themselves restrained in their debates by the statute of the six articles, the king granted them a dispensation of that law before it was repealed, as was actually done soon after.³

¹ By stat. 1 Edward VI., c. 2.

² *Vide ante.*

³ Hume, vol. iv., 308.

The last act of this king's reign had an extraordinary appearance: he was prevailed on to alter the succession of the crown (founded on an act of the last, and confirmed by one of the present reign) by patent. The judges were required to draw an instrument to this effect; but knowing the penalty of treason was denounced on those who aided in changing the succession, they at first refused. The king said he meant it should be ratified by parliament; which no doubt would have been accomplished if the king had survived long enough.¹

At the beginning of this reign the bishops were constrained to take out new commissions, of the same kind as those they had in the latter part of the last reign; by which they submitted to hold their bishoprics during the king's pleasure, and were to exercise the episcopal function as his delegates, in his name and by his authority.² This alteration was designed to forward the Reformation, by keeping in dependence those bishops who still adhered to the old superstition.

Upon occasion of the insurrections about inclosures, and other subjects of complaint among the people, Somerset, who always aimed at popularity, appointed a new sort of commissioners, whom he sent everywhere with unlimited power to hear and determine all causes about inclosures, highways, and cottages.³ This created some clamor among the gentry, who looked on it as illegal and arbitrary. It was in the same spirit that Somerset had erected a court of requests in his own house for the relief of poor suitors.⁴ There he used to hear complaints; and, in consequence of what passed there, it sometimes happened that he would intercede with the judges in matters depending before them. This raised more scandal than the commission above mentioned; and though he by such means grew into great favor with the populace, he drew upon himself a proportioned degree of odium from the nobility, who soon showed him how able they were to defeat all the support he might hope from the people.

The few trials for offences which have come down to us must be taken as evidences of the practice of our courts in those times, and as such are very striking events in the history of our law.

¹ Hume, vol. iv., 363.

² *Ibid.*, 329.

³ Burn. Ref., vol. ii., 5.

⁴ *Ibid.*, 335.

The proceedings against the Duke of Somerset, in the reign of Edward VI., are worthy of notice. Trial of the Duke of Somerset. The indictment was for treason and felony.

Upon the trial the prosecution was supported, as usual, by depositions, without confronting one witness with the prisoner, a conduct which was at length thought so extremely repugnant to common justice as to become the immediate cause of stat. 5 and 6 Edward VI., which we have already so often mentioned. This prosecution is on other accounts worthy of observation. The Duke was acquitted of the high treason; and that part of the indictment is held by Lord Coke to be ill, because the overt act was laid only generally. The other part was grounded upon the late stat. 3 and 4 Edward VI., c. 5, which made it felony to call together persons to the number of twelve, with the intent to commit certain acts of violence therein mentioned; among which that of imprisoning a privy councillor is one. The charge was for attempting in this manner to imprison the Earl of Warwick.

The common stories of this proceeding inform us that he was acquitted of the treason and found guilty of the felony; so it is related in King Edward's journal; and he was upon that attainder beheaded. Lord Coke remarks upon this attainder and execution that the truth concerning it is contrary to some of our chronicles and the vulgar opinion, and *in some points contrary to law*. First, as to the notion that he was wrongfully executed, and ought, by law, to have had his clergy; he says that clergy is expressly taken away by this statute. Secondly, as to the opinion that he was indicted on stat. 3 Henry VII., c. 14, for going about to *procure the death* of the Earl of Warwick; he says he was indicted for endeavoring to *take and imprison* that nobleman, as plainly appears from the indictment.¹ Again he remarks, that being attainted but for felony, he could not, by law, be beheaded.² Those who thought the Duke was wrongfully deprived of his clergy, or rather (as it was said) that he never demanded it, and that it was not to be granted by the court but upon prayer, founded their remark upon a supposition that the indictment was upon the above-mentioned statute of

¹ Coke's Ent., 3 Inst., 13.

² 3 Inst., 12, 13.

Henry VII., which makes that offence only single felony.

The proceedings against Lord Seymour, in the reign of Edward VI., show how the opinions of men Bills of attainder. were now altered respecting bills of attainder.

Articles were drawn up against that nobleman, which, it appears by the council-book, were fully proved by witnesses, and by letters under his own hand. He was sent to and examined by some of the council; but he refused to give any *direct* answer, or to sign such as he had given. It was then resolved that the whole council should go to the Tower and examine him. When they attended him, the answer he made was, that he expected an open trial, and his accusers to be brought face to face. After this fruitless attempt, it was determined to proceed in a parliamentary way. Accordingly, a bill was brought into the House of Lords for attainting him of treason. This the peers easily passed in the manner they had been accustomed to in the reign of Henry VIII. However, some show of justice was observed. All the judges and the king's counsel delivered their opinion that the articles were treason: then some of the lords were produced as witnesses, who gave their testimony so fully, that all the rest, with one voice, assented to the bill.

When the bill was sent to the commons, it was accompanied with a message, that, if they desired to proceed as the lords had done, such of them as had given evidence before the upper house should come down and declare it to the commons. In this house the bill met with some opposition. Many argued against attainders in the party's absence: they said it was a strange way of proceeding, that two or three peers should rise up in their places, and say somewhat to the slander of another, and that he should be thereupon attainted. It was pressed, therefore, that there should be something like a trial; that the lord admiral should be brought to the bar, and be heard for himself. But here the king interposed, and informed the commons by message *that there was no necessity of sending for the admiral.* The commons, as usual, gave ready obedience to the pleasure of the court, and passed the bill with four hundred voices for it, and not more than ten or twelve against it.¹ However, a view of this proceeding against

¹ Burn. Ref., vol. ii., 93, 94.

Lord Seymour shows that this extraordinary way of condemning was not entirely relished by the parliament.

Afterwards, when the bill of attainder of misprision of treason against Tunstall, Bishop of Durham, was sent by the lords to the commons, with all the evidences, which were depositions, exhibited to the lords, the commons resolved to discountenance such a practice, and would not, at that time, proceed upon it. At another day, they ordered the privy councillors in their house to move the lords that his accusers and he might be brought face to face (from which we may conclude that the examinations which produced the depositions had been, as they generally were, *ex parte*, in the Star Chamber); but that not being complied with, *they would not pass the bill*.¹

In the reign of Queen Mary, the attainder of the Duke of Norfolk, which had passed in the latter end of Henry VIII., was represented as null and void, as well on account of other informalities as *because* no special matter was alleged against him, except the wearing of a coat of arms which his ancestors had, many years before him, worn without offence.²

The principal oppressions in these two reigns, whether by summary and illegal trials, by imprisonment, confiscation, execution, or otherwise, were occasioned by the alterations in religion; and these were carried to extraordinary, though not to equal lengths, both by Protestants and Catholics, according as each party had, in its turn, the aid of the executive power.

In the reign of Edward VI., when the king's councils, in matters of religion, were principally directed by the candid and gentle spirit of Cranmer, the government was sometimes transported, by zeal for their new opinions, beyond the bounds of moderation (*a*).

Judicial proceedings on account of religion.

(*a*) Many antique jurisdictions "general or local" died out in this age of our legal history. "Justices in eyre," for instance, were practically superseded by a series of decisions in the reign of Edward VI., which established an older and superior jurisdiction in the Court of King's Bench. That court, it was said, was before the justices in eyre and at common law; all the matters inquirable before the justices in eyre could be inquired of in that court, *quo warranto*, for instance, and that the king could take all such matters into that court (*Keilway*, 153). The last commissions of justices in eyre therefore appear to have been in this reign, when it was held that they had nothing to do with the forests, etc. (*Ibid.*).

¹ Burn. Ref., vol. ii., 185.

² Hume, vol. iv., 374.

The proceedings against Gardiner, Bishop of Winchester, were very severe, and on very slight grounds. He had been enjoined by the council to inculcate in a sermon the duty of obedience to a king during his minority. He neglected to comply with this; and had, on that account, and no other, been thrown into prison, where he lay two years. At the end of that period, the lord treasurer and other privy councillors went to him at the Tower, and presented him with certain articles, containing most of the points of the reformed religion, to which they required his assent. With all these he promised an entire compliance if he was suffered to be at large, excepting only one article, which contained an acknowledgment of his own delinquency: but they persisted in requiring his subscription absolutely to the whole. He still refused. Upon this, the income of his bishopric was sequestered, and he was required to conform himself to their orders within three months, under pain of deprivation, and being confined to a closer custody.

All this was much censured at the time as illegal and inquisitorial. A man shut up in prison upon a complaint only; and without any further inquiry, after two years, required to give his assent to articles of faith. However, some reasoning from the canon law, and the way of proceeding *ex officio*, were thought to give a color to this transaction, and in some degree to excuse, if not to justify, the hard measure this prelate suffered¹ (a).

(a) These severities, says Hume, seemed in that age a necessary policy in order to enforce a uniformity of public worship. Though the Protestant divines had ventured to renounce opinions deemed certain during many ages, they regarded, in their turn, the new system as so certain that they would suffer no contradiction with regard to it, and they were ready to burn in the same flames from which they themselves so narrowly escaped every one that had the assurance to differ from them. A commission, by act of council, was granted to the primate and some others—Cranmer, Ridley, Thully, Redman, Latimer, Coverdale, Parker, secretaries Petre, Reid, and others—to examine and search after all anabaptists, heretics, or contemners of the Book of Common Prayer (*Burnet*, vol. ii., p. 3; Rymer, tom. xv., fol. 181). The commissioners, if the criminals were obstinate, were to deliver them over to the secular arm, and in the execution of this charge they were not bound to observe the ordinary modes of trial (*Ibid.*, c. xxxiv.). Some were brought before the commissioners and persuaded to abjure; but there was a woman accused of heretical pravity on whom the commissioners could make no impression, and she was condemned to the flames. According to the historian, the king had more sense than all his councillors and

¹ Burn. Ref., vol. ii., 144.

At the end of three months, a commission was directed to some bishops and others, clergy, laymen, and lawyers,

preceptors, and long refused to sign the warrant for her execution, and that Cranmer was employed to persuade him into compliance (*Ibid.*). At all events, the poor woman was burnt; as also was an unhappy man, an anabaptist. These rigorous methods of proceeding, observes Hume, soon brought the whole nation to a conformity, seeming or real, with the new doctrine and new liturgy (*Ibid.*). Here we may observe the pernicious influence of penal laws as to religion, as inducing hypocrisy, and in destroying all sincerity and honesty in a nation. In all England there was at that time, he adds, only one person who had the honesty to avow her adherence to the ancient faith. "The Lady Mary alone continued to adhere to the mass, and refused to admit the established mode of worship" (*Ibid.*); that is, the future queen. She was probably not more a Catholic than most of the king's council, who issued commissions to prosecute people for not coming to church, or for attending the mass; and beyond a doubt many, if not most of them, were adherents in their hearts to the old religion. Most certainly all of them had in the late reign professed to be so. The councillors of Edward VI. were the councillors appointed for him by Henry VIII., who died in the old faith: Sir William Herbert, for instance, Sir R. Rich, Wriothesley the chancellor, Sir Wm. Petre, Russell, Paget, Paulett, and the rest. They had all professed to be Catholics under Henry, professed to be Protestants under Edward, professed, most of them, to be Catholics under Mary, and some of them even lived to profess themselves Protestants once more under Elizabeth. It is obvious that these successive changes had arisen in slavish subserviency to the will of the sovereign or the ruling power in the state, and that the persecutions these men inflicted had nothing to do with religion—at all events, were not the result of honest bigotry, but of selfish policy. Sir James Mackintosh has a passage in his history, under the reign of Elizabeth, in which he exposes the servility and insincerity of the ministers of that age. "The Marquis of Winchester, who had served Henry VII., retained office under every intermediate government" (*i. e.*, down to the reign of Elizabeth). "Sir William Herbert, whom Henry VIII. had enriched by a grant of the monastery of Wilton, and ennobled by the title of the Earl of Pembroke, had with open arms devoted himself to every successive sovereign. Sir William Petre had been secretary of state under Henry and his three children;" that is to say, issuing warrants for the persecution of Papists and Protestants under Henry, of Catholics under Edward, of Protestants under Mary, and of Papists once more under Elizabeth. It is manifest that these persecutions were not the result of honest religious bigotry, but of an unscrupulous and slavish subserviency to the will, the passions, and the prejudices of the reigning sovereign. In other words, they were the fruits of royal tyranny, rather than of religious bigotry. Even so far as the sovereigns were concerned, these persecutions were dictated, not so much by the spirit of religious bigotry as by the spirit of regal tyranny. Men were persecuted because they did not choose to adopt the religion of the sovereign; it was assumed to be the right religion because it was that of the sovereign; and it was also assumed that the sovereign had a right to persecute all who did not adopt it. The slavish statesmen and the subservient parliaments of those times recognized this hateful principle, and were always ready, with rare exceptions, to obey and to enforce it. They enforced it equally under Henry and all his successors against the adherents of either religion, just as the will of the crown required. What wonder that what prelates recognized and parliaments upheld, sovereigns should believe it their duty to maintain? But it is obvious that the cause of it all was the doctrine

to try Gardiner. As there had been no regular charge at first, this was a short business. He appealed from the commissioners to the king, objecting to this tribunal as illegal. The appeal was disregarded, and sentence of deprivation was passed upon him by the commissioners. His books and papers were seized; he was secluded from all company, and was not allowed to send or receive any letters or messages.¹ Tunstall and other bishops were deprived by commissioners of the same kind; which prelates were all again restored by a like act of power in the reign of Philip and Mary, by a sentence of commissioners appointed to review the process and condemnation;² and the sentence was justified as under a regular proceeding *ex officio*.

The method of proceeding in the bishop's court for heresy was, to the last degree, oppressive and insidious. They used to exhibit to the accused person certain articles, consisting of such points of faith which they knew he had his doubts about, or was reputed to deny; and if he did not declare his assent to them, there was an end of the inquiry: he was condemned and executed.

There were two executions for what was called heresy in the reign of Edward VI. These sufferers were anabaptists.

of the royal supremacy, and the root of it was the spirit of regal tyranny in which it arose; for the church had no power to persecute without the will of the state. The church was never weaker than in that age of persecution. She had no power even to keep her own, or to protect the persons of her prelates. They themselves were the chief victims of persecution. Fisher was beheaded under Henry V.; Gardiner and Bonner persecuted under Edward; and they only lived to practise the lessons of a persecution they had in their own persons endured, though not, it is true, unto death; and, on the other hand, those who, like Latimer under Henry, or Ridley under Edward, or Cranmer under Henry and Edward, had inflicted persecution for religion upon others, were destined in the next reign to endure what they had inflicted. But whatever was inflicted was inflicted under the authority of the state, and by virtue of power emanating from the crown; and it was inflicted upon the adherents of either religion at the will of the crown.

¹ Hume, vol. iv., 345.

² Ibid., 375.

CHAPTER XXII.

PHILIP AND MARY.

LAWS AS TO RELIGION—THE ROMAN CATHOLIC RELIGION RE-ESTABLISHED—THE CRIMINAL LAW—REPEAL OF TREASONS, FELONIES, AND PRÆMUNIRE—RIOTOUS ASSEMBLIES—STEALING OF WOMEN—OF BAIL IN CRIMINAL CASES—OF WITNESSES IN TREASON—DISTINCTION BETWEEN MURDER AND MANSLAUGHTER—BURGLARY TO BE BY NIGHT—TRIAL OF PRINCIPAL AND ACCESSARY—OF THE GOVERNMENT—STATE TRIALS—SIR N. THROCKMORTON'S CASE—BILLS OF ATTAINDER—JUDICIAL PROCEEDINGS ON ACCOUNT OF RELIGION—LAW-BOOKS OF THE REIGN—STAUNFORD—PRINTING OF LAW-BOOKS—MISCELLANEOUS FACTS.

QUEEN MARY soon overturned everything which had been done in the former reign for a reformation of religion (a). After an act repealing all new-created treasons, felonies, and cases of præmunire, and another to establish her own legit-

The Catholic religion re-established.

(a) "It was natural that Mary, at her accession, should desire to restore the law as to religion and the church to the state in which it was at the accession of Henry VIII., but as she proceeded only with the authority of parliament, she was at first compelled to be content with its restoration to the state in which it was at the death of Henry. So far as regarded the forms of faith and worship, there was not much difficulty, for Henry had left the Roman Catholic religion the religion of the state; the new formularies had only been established four years, and they were regarded as innovations by the great body of the nation. It was quite otherwise as regarded the supremacy. Its exercise in England had been abolished for thirty years. The existing generation knew no more of the pope, his pretensions, or his authority, than what they had learned from his adversaries. His usurpation and tyranny had been the favorite theme of the preachers, and the re-establishment of his jurisdiction had always been described to them as the worst evil which could befall them. In addition to this, it was said and believed, that the restoration of ecclesiastical property was essentially connected with the recognition of the papal authority. If the spoils of the church had been at first confined to a few favorites and purchasers, they had now become, by sales and bequests, divided and subdivided among thousands, and almost every family of opulence in the kingdom had reason to deprecate a measure which, according to the general opinion, would induce the compulsive surrender of the whole or a part of its possessions" (*Lingard*, vol. v., c. 5). As instances of this also might be mentioned all the principal men in the country and those who were ministers in the next reign, such as Russell, Cecil, Pembroke, and numerous others. Sir William Cecil had been made rector of Wimbledon in Edward's reign, and resided in the parsonage. The

imacy, and declare null and repealed all sentences, orders, and laws to the contrary, an act was passed, stat. 1 Mary,

family of Russell was founded upon the spoils of the monasteries. So of nearly every family found among the supporters of the new opinions; consequently in the first session a measure to repeal all the laws of the last reign affecting the exercise of religion as it stood at the first year of Henry VIII. was regarded with dislike as an attempt to restore the papal supremacy, and Mary, in a letter to Cardinal Pole, wrote "*Plus difficultatis fit circa auctoritatem sedis apostolicæ quam veræ religionis cultum*" (*Quirini*, iv., 119; *Ling.*, v., c. 5). And in the next session an act affirming the marriage of Henry and Catharine, and repealing all acts which sanctioned the divorce, carefully omitted all reference to the papal dispensation, and therefore passed without opposition, though in effect it bastardized Elizabeth, who, it is very remarkable, never ventured to propose its repeal. The next measure also was carefully so framed as not to raise the question of the papal supremacy, and it merely restored religion to that state in which it was at the accession of Edward and at the close of the reign of Henry VIII. The reformed liturgy, established in the previous reign, was now declared a new thing, devised by a few of singular opinions. The acts establishing the Book of Common Prayer were repealed, and in lieu thereof it was enjoined that such forms of faith and worship should be restored as had been most commonly used in the last year of Henry VIII. All this was without any repeal of the statutes as to the royal supremacy, but it was not by virtue of the royal supremacy alone, but by the authority of statute. It was in each case with the sanction of parliament, and within the compass of five years. It is to be observed that Mary was in this difficulty: that not herself assuming, but on the contrary disclaiming, the spiritual supremacy which had been asserted by her predecessors, she could conscientiously, not by an exercise of that supremacy, attain her object, and, indeed, its exercise was now limited and restrained by the statutes of the last reign. Constitutionally and conscientiously, therefore, she was obliged to proceed by statute, which had the assent of the bishops as well as of the lay lords and commons in parliament assembled. And having to proceed constitutionally by the authority of parliament, she was obliged to proceed in accordance with the will and the mind of parliament, which, for the reason already stated, was far more in favor of the restoration of the old religion in its forms of faith and worship than in its essential and fundamental tenet of the spiritual supremacy of Rome. The old forms of faith and worship then were restored by statute. The change was sudden, and it was natural that the restoration of the old religion should cause irritation among the partisans of the new; and this is the key to that which forms so marked a feature of this reign, though it was really no more so of this than of those which preceded or followed it—the executions on account of religion. For the queen at first was content to restore the old religion, and passed no laws to force it upon her subjects. But it appears from history and from the statute-book, that violent riots were excited by the partisans of the new opinions, in consequence of the restoration of the old religion. Cranmer himself, the late archbishop, published a violent paper, in which he denounced the mass, which he himself had celebrated all through the reign of Henry, as containing horrible blasphemies (*Strype's Cranmer*, 305); and naturally enough, after the publication of such an exciting manifesto, riots were often excited by the celebration of mass. When a Catholic clergyman preached at Paul's Cross, a dagger was flung at him, and there was such a violent disturbance that he had to fly for his life, and priests were violently assaulted, or even stabbed, when about to celebrate Catholic worship (*Maitland's History of the Reformation*). The Riot Act of

st. 2, c. 2, repealing all the under-mentioned statutes, being all that were passed in her brother's reign for the

Edward VI. was in consequence revived, and it was extended to such meetings as should have for their object to change by force the existing laws in matters of religion (1st of *Mary*, c. xii.). Indeed, actual rebellion broke out, and though it was suppressed, yet at a later period of the reign the continuance of these outrages (of which Strype gives instances) provoked the recurrence to the execution of the law against heresy. In the meantime the queen proceeded with her design to restore the religious polity of the kingdom to the state in which it existed at the time of her birth. In her first parliament she had prudently confined her efforts to the re-establishment of the ancient forms of worship. In the next she proceeded to the recognition of the papal supremacy. This, however, as already mentioned, was embarrassed with the difficulty about church property, and as it was only by an act of papal supremacy, according to the law of the Roman Catholic Church, which had now been restored by the repeal of the statutes of Edward, that the alienations of church property could have been authorized, so now it was only by an act of that supremacy it could be by canon law legalized. Yet it was necessary that it should be legalized before parliament, composed chiefly of the holders of church property, could be brought to assent to the restoration of the papal supremacy. Consequently the pontiff issued a bull, in which he empowered the legate to give alien, and transfer church property to its present holders. Then, and not till then, parliament proceeded to pass an act restoring the papal supremacy, by repealing every statute which had been enacted against it. From this it followed that the papal supremacy was restored in these respects: first, that the pope was acknowledged as supreme head of the church, with power to correct heresies, errors, and abuses within it; secondly, that it was acknowledged that to him pertained the confirmation of election of bishops, and that he had authority to grant dispensations, and remove disabilities arising from canon law; and, lastly, that he had a supreme appellate jurisdiction in spiritual and ecclesiastical cases. But this restoration of the papal supremacy in spiritual matters was entirely by the authority of parliament, and was carefully limited. While it was provided that all papal bulls, dispensations, and privileges, not containing matters prejudicial to the royal authority, or to the laws of the realm, might be put in execution, used, and alleged in all courts, it was also provided that nothing in the act should impair any authority or prerogative belonging to the crown in the 20th year of Henry VIII. (the year in which the statutes passed abolishing the supremacy), and that the pope should have and exercise, without diminution or enlargement, the same authority and jurisdiction which he might then have lawfully exercised; so that the effect was simply to restore the law as to religion to the state in which it was in the early part of the reign of Henry VIII., and as it had existed for centuries before, in fact, ever since the foundation of the monarchy. There was also a special enactment as to church property, that although the legatine authority had taken away any liability of parties holding it to impeachment upon canon law, yet, because the title of lands and hereditaments within the realm was grounded on the laws of the realm, the title of the holders was confirmed. Nothing could more clearly draw the line of distinction between the spiritual and the temporal power, between the province of ecclesiastical law and the domain of municipal law. The latter alone was to be allowed to govern the titles to property, and what had been declared by law to be so; the former could only regulate matters of an ecclesiastical nature. This was the distinction which had been drawn from the earliest times in the history of our law, and was now restored. The church was simply replaced in the position

reformation of the church; namely, stat. 1 Edward VI., c. 1, against such as speak unreverently of the body and blood

in which it was at the accession of Henry, and the papal supremacy was restored only in spirituality, leaving the crown still sovereign and supreme in the temporality. The ecclesiastical power therefore had no power to inflict temporal pains and penalties for any cause, and had no power to inflict such punishments for heresy. That power could only be derived from the state; and though in the last reign it was held, that by the common law heresy was punishable as a crime, and punishable by death, the power in this reign was not exercised without the authority of parliament. And so of all subsequent measures as to religion. A subsequent parliament, composed for the most part of the very men who, in the previous reign, had established Protestantism, now acquiesced in the restoration of the Roman Catholic religion, so thoroughly had royal tyranny destroyed honesty — so entirely had subserviency to royalty produced hypocrisy and servility. Both Houses, says Hume, being invited by the papal legate to reconcile themselves and the kingdom to the apostolic see, from which they had so long and so unhappily divided, voted an address, acknowledging that they had been guilty of a most horrible defection from the true church, professing a sincere repentance of their past transgressions, and declaring their resolution to repeal all laws enacted in prejudice of the Church of Rome (*Hist. Eng.*, vol. iv., c. xxxvi.). There was indeed one remarkable exception which showed the insincerity of these professions, and that they were the mere result of servility to royalty; the parliament would not restore the church property. "Notwithstanding," observes the historian, "the extreme zeal of those times for and against popery, the object always uppermost with the nobility and gentry was their money and estates; they were not brought to make these concessions in favor of Rome till they had received repeated assurances from the pope, as well as the queen, that the plunders which they had made on the ecclesiastics should never be inquired into, and that the abbey and church lands should remain with their present possessors" (*Heylin*, p. 41; *Hume*, vol. iv., c. xxxvi.). But not trusting altogether to these promises, the parliament took care, in the law itself by which they repealed the former statutes against the pope's authority (1 and 2 *Philip and Mary*, c. viii.), to insert a clause in which, besides bestowing validity on all marriages celebrated during the schism, and fixing the rights of incumbents to their benefices, they gave security to the possessors of church lands, and freed them from all danger of ecclesiastical censures. The convocation also, in order to remove apprehensions on that head, were induced to present a petition to the same purpose (*Heylin*, 43; 1 and 2 *Philip and Mary*, c. viii.), and the legate ratified all their proceedings. It now appeared that notwithstanding the efforts of the queen, the power of the papacy was effectually suppressed; for though the jurisdiction of the ecclesiastics was for the present restored, their property, on which their power much depended, was irretrievably lost (*Hume's Hist. Eng.*, vol. iv., c. xxxvi.). The historian adds, "The parliament having secured their own possessions, were more indifferent with regard to religion, or even to the lives of their fellow-citizens, and they renewed the old sanguinary laws against heresy, which had been rejected in the former reign; which latter observation, however, is an entire error, for, as has been seen, these odious laws were in that reign re-enacted against Romanists. However, parliament and the council now directed the same penal laws against Protestants, not from bigotry, but for the most part from policy. The ministers and the prelates of that age were, with scarcely any exception, entirely devoid of all principle, political or religious. Nothing could be more fallacious than to ascribe the legislation of these times to principle of any kind,

of Christ; stat. 1 Edward VI., c. 2, relative to the election of bishops; stat. 2 and 3 Edward VI., c. 1, concerning uni-

unless it was that of the despotism of royalty, which, during the reign of Henry, maintained the royal supremacy under Mary, upheld the papal Mary herself, while restoring the papal supremacy in name, yet upheld the royal supremacy which made it no more than a name. "The Marquis of Winchester," says Mackintosh, "who had served Henry VII., retained office under every intermediate government. William Herbert, whom Henry VIII. had enriched by a grant of the monastery of Wilton, and ennobled by the title of Earl of Pembroke, had with open arms devoted himself to every sovereign. Sir William Petre had been secretary of state under Henry and his three children, supporting equally governments which persecuted Catholics and Protestants. It is evident that the only principle (if any principle at all was regarded by such men) was the principle which Henry had established as the natural result of the royal supremacy, that it was the prerogative of the sovereign to dictate the religion of his subjects, and to persecute those who did not adopt it. Religious bigotry, it is obvious, could not have been the motive with these men; and it should be kept in view that, notwithstanding the bigotry of the sovereign, it could not have been done without their concurrence. The law required to be altered, and fresh legal powers created and conferred. "As the bishop's court appeared not to be invested with sufficient power, a commission was appointed, by authority of the queen's prerogative, more effectually to extirpate heresy" (*Hume's Hist.*, vol. iv., c. xxxvii.). The bishops had no power or authority to do these things, neither had they sufficient power in the council to carry out their own will. Gardiner was there, but he was opposed by Pole, the papal legate; and the greater influence of the church was brought to bear against the insane and infernal policy pursued. The see of Rome saw its insanity and foresaw its fatal effects, and pointed out its consequences and warned against it, unhappily in vain. It was not, therefore, the policy of the church, but of the crown, and not merely of the crown, but of the state. It was the act of the crown, with the authority of parliament and the assent of the council. The effect, as any one could foresee, would be to render the Catholic religion odious for centuries. "Every martyrdom," says Hume, "was equivalent to a hundred sermons against popery, and men either avoided the horrid spectacles, or returned from them full of a violent though secret indignation" (*Hist. Eng.*, vol. iv., c. xxxvii.). And it was the council who kept pressing on these dreadful and abominable persecutions. Repeated orders were sent from the council to quicken the diligence of the magistrates in searching out heretics, the council, composed almost entirely of laymen and largely of Protestants; and in some places the gentry were constrained to countenance by their presence those barbarous executions (*Ibid.*); in some places, *i. e.*, when they did not attend voluntarily for the purpose, as they did when they were holders of church lands. When they were not, they required those quickening letters from the council, composed of men who were promoters. The key to the legal history of this and the subsequent reigns is the question of church property. It appears from the statutes of Henry VIII., and from the cases in the law reports of the time, that the confiscated lands of the church had been let out on long leases, or otherwise disposed of, to laymen, who of course were interested in the preservation of property in which their money was invested. On the other hand, it was, as Sir James Mackintosh observes in his *History*, difficult to reconcile the pope to the condition most essential to the peace of the papacy with England, that of security to the possessors of abbey lands. At last, as an expedient for reconciling the unquiet minds of dishonest possessors to the indelible claims of the

formity of service and administration of the sacraments; stat. 2 and 3 Edward VI., c. 21, made to take away all

church on her ancient property, powers were given by the pope to the legate to remove all danger or trouble which by canons or ecclesiastical decrees might touch the possession of such goods (*C. S. Statutes of the Realm*; 1 and 2 *Philip and Mary*). "This form," says Sir J. Mackintosh, "was adopted, and it seems to have been sufficient, according to the doctrines of all reasonable Roman Catholics, since it left all questions which directly concerned property to the municipal law and the lay tribunals" (*Hist. Eng.*, vol. i.). But it proved insufficient for all that. For in the course of a single year after the reconciliation to Rome, doubts arose in men's minds. "The alarm of the nobility," says Sir J. Mackintosh, "for their large share in the plunder of the church, was excited by causes of a very different and much more ignoble nature. The pope, who had received the English ambassadors, thought it necessary to expostulate with them in private on the detention of the goods of the church. . . . True, he had remitted all ecclesiastical censures respecting the property of the church in England, but he could not wash out the indelible stain of rapine. From the penalties of the canon law he had released the holders of church lands, but he could not release them from being answerable to God for a breach of the eternal and immutable laws of justice." And the historian admits that there was some color of truth in this reasoning, on the important distinction between what is illegal and immoral. The queen herself, he goes on to state, was not slow in listening to the councils of the supreme pastor; and she restored that portion of the confiscated property which still remained in the hands of the crown. But if we may believe Pallavicino, "she deemed it advantageous to use condescension to private individuals, who held the greater part of the usurpations, lest she might enroll the numerous usurpers of abbey lands under the standard of an ill-suppressed heresy" (*Card. Pallav.*, lib. xiii., c. xiii.). At all events, the question was raised and mooted, and men's minds had been disturbed by it from the time the reconciliation with Rome was proposed, upon the accession of the sovereign to the throne. And there is too much reason to believe that it had an influence upon the dreadful persecutions which ensued; for the orders emanated from the council, not from the prelates. "The privy council," says Sir James Mackintosh, "wrote letters to the nobility and gentry, desiring their attendance at the burnings, and thanked those who went without being asked;" whence it appears that the laity of the wealthier classes—those among whom were the possessors of church lands—were the promoters of these persecutions. It is plain that the prelates were not. For Sir J. Mackintosh states that, "of fourteen bishoprics, the Catholic prelates used their influence so successfully as altogether to prevent bloodshed in nine, and to reduce it within limits in the remaining five. Justice to Gardiner" (the chancellor) "requires it to be mentioned that his diocese was of the bloodless class" (*Hist. Eng.*, vol. ii.). And the historian truly states that the attendants on these scenes of more than heathen cruelties were originally composed of the worst men of the country (*Ibid.*). It is obvious, however, from the extracts he cites, that they were men of property; and there can be no reason to doubt, from the wide division and diffusion of the confiscated lands, that many of them were holders of church property, and of course would eagerly promote any proceedings which should tend to prevent a permanent reconciliation with Rome or cause a reaction in favor of separation. Beyond all doubt these cruelties had that effect, and in the next reign resulted in feelings of animosity to Rome, which became almost engrained in the national character, and has survived even to our own times. It is an undoubted fact that the council sent circular letters to the magistrates, directing them

positive laws against the marriage of priests; stat. 3 and 4 Edward VI., c. 10, made for the abolishing of divers

to apprehend the propagators of seditious reports, the preachers of erroneous doctrines, the procurers of secret meetings; to try those charged with civil offences, and to deliver those accused of heresy to the ordinary, to be dealt with according to the laws in that behalf (*Burnet*, ii., 283; *Strype*, iii., 213). The bishops, however, were so reluctant to move in the matter, that a reprimand was sent to the Bishop of London from the council (*Fox*, ii., 208; *Strype*, iii., 217; *Burnet*, ii., 285). And the persons he was thus compelled to try by the law as it stood were sent to him by the council, or commissioners appointed by the council. He complained, indeed, of the duty thus forced upon him (*Fox*, iii., 462). So that it is plain, as a matter of simple historical truth, that these persecutions were really the acts of laymen, not of churchmen, the results of policy rather than of bigotry, the fruits of arbitrary power and bad legislation far more than religious zeal or spiritual tyranny. The prelates at that time were thorough sticklers for the royal supremacy. Gardiner and all of them had supported it under Henry, and adhered to it now. The new statute re-establishing the papal supremacy restored it, with the old restrictions and exceptions as to the royal prerogative, and even with these qualifications the Bishop of London voted against it, and there were two clauses introduced in the commons as to church property—the one to guard against its re-acquisition, the other, against its restitution. It is, therefore, clear, that the church was only restored as it had existed under Henry, and that it was still the spirit rather of royal tyranny and arbitrary power which was paramount, not the power of the church, or spiritual supremacy. The power to punish heretics was not exercised without the authority of parliament, and was conferred by statute. And the manner in which it was conferred supports the view already suggested, that in those of the promoters of the measure who were honest it was not intended as a policy of persecution, but of repression, and was provoked by the violent and seditious attempts to resist the restoration of the old religion. For the course taken was by revival of the statutes against the “Lollards,” or levellers, of the previous century, statutes which most certainly had been passed in consequence of their supposed tenets not only being hostile to the established church, but enforced by dangerous agitation and actual sedition. It is simply a matter of fact that this statute law was not revived until it was found that all over the country the restoration of the old religion was resisted with force and violence, until riots were raised, and priests were actually stabbed or shot at when about to celebrate the Catholic worship. It is also a fact that the course taken was in entire accordance with the precedents established in the previous reign, and in pursuance of the policy then, as well as now, approved. For in the last reign a statute passed making the maintenance of the papal supremacy high treason. And Edward VI., under the influence of Cranmer and Ridley, had issued commissions in which he declared that, as Moses put blasphemers to death, so it was his duty, as a Christian prince, to eradicate heresy (*Rymer*, xv., 182, 250). And so, in the next reign, Elizabeth issued commissions for burning of heretics (*Ibid.*, xv., 740). So that the execution of heretics was only in pursuance of the established policy of the age, and was not pursued in this reign until it had been sanctioned by the authority of parliament. Neither was it ever proposed by the church, or by the ecclesiastics; on the contrary, the bishops, as a body, were against it, and were so opposed to it that, even after the law passed, they required to be urged on to it by the council to put it in execution, and even then, in spite of all the urgency of the council, avoided putting it in execution in nine out of the thirteen dioceses. It was a lay policy, not an ecclesiastical policy;

books and images; stat. 3 and 4 Edward VI., c. 12, made for the ordering of ecclesiastical ministers; stat. 5 and 6 Edward VI., c. 1, made for the uniformity of common prayer and administration of the sacraments; stat. 5 and 6 Edward VI., c. 3, made for the keeping of holy-days and fasting-days; and stat. 5 and 6 Edward VI., c. 12, touching the marriage of priests, and legitimating their children; and it was moreover enacted, that all such divine service and administration of sacraments as were most commonly used in England in the last year of Henry VIII. should be used through the realm, and no other.

Thus was the national worship brought back to the state it was in at the death of Henry VIII.; and that it might be performed without disturbance or impediment, it was enacted by stat. 1 Mary, st. 2, c. 3, that any person who, by word or deed, should maliciously molest any preacher, authorized to preach, in his sermon, preaching, or collation; or should maliciously disturb any lawful priest, preparing or celebrating the mass, or other such service, sacraments, or sacramentals, as were most commonly used in the last year of Henry VIII., or spoil or deface the sacrament commonly called the sacrament of the altar, or the *pix*, or canopy where the sacrament was; or break any altar, crucifix, or cross, in any church, chapel, or churchyard; such offender should be taken before one justice, who, if he thought fit, was to commit him to custody; and within six days the same justice, with another, was to examine him; and if he was convicted by two witnesses, or his own confession, they were to commit him for three months, and further to the next quarter-sessions; when, if he did not repent, he was to be again committed till he became reconciled and penitent. If such offenders were not immediately taken, the parish was to forfeit £5, to be levied as in cases of hue and cry by the statute of Winchester, and stat. 3

it was by virtue of a law passed by the lay power of the state, and put in execution by those powers. Whether those who urged it were actuated by crafty policy or honest bigotry, or whether, as is most probable, some were actuated by one class of motives, and some by others, it was a *lay* measure, put in force entirely by laymen, that is, at the urgent instance, and under the constant direction of laymen; and it was in pursuance of the same system which was pursued in the previous reign, and was to be pursued in the next. It was in pursuance of the same system of government as that which dictated the Riot Act of Edward VI., and which dictated a similar act in this reign to repress the riots occasioned by these sudden changes in religion.

Henry VII., c. 1. Notwithstanding this statute, the ordinary might punish these offences by ecclesiastical censures, so as none were punished twice. The penal provisions of this act are much stricter than any the Reformers had made in the former reign, to secure their establishment, in matters of the like kind.

Severer methods were now preparing for the correction of those who did not conform to the religion of the court. By stat. 1 and 2 Philip and Mary, c. 6, there is a revivor of stat. 5 Richard II., st. 2., c. 5, concerning arresting of heretical preachers; of stat. 2 Henry IV., c. 15, touching repressing of heresies, and punishment of heretics; and of stat. 2 Henry V., c. 7, concerning the enormity of heresy and Lollardy, and the suppression thereof. After these three penal laws were revived against heresy, there follows a very long act of parliament, containing a history almost of the return of the nation into the bosom of the Romish church: and the complete re-establishment of the pope's authority here, as it had been in the twentieth year of Henry VIII., before the innovations begun in that king's reign.

Papal authority
re-established.

This is stat. 1 and 2 Philip and Mary, c. 8. It opens by stating, that "much false and erroneous doctrine had been taught, and spread abroad here since the twentieth year of Henry VIII., so that as well the spirituality as the temporality had swerved from the obedience to the see apostolic, and declined from the unity of Christ's church, and so continued until her Majesty was first raised up by God to the throne, and then married to the king; *to whom (as unto persons undefiled, and by God's goodness preserved from the common infection)* and to the whole realm, the apostolic see had sent *the Lord Cardinal Pole, legate de latere*, to call them home again into the right way, from whence they had a long while wandered; that they, seeing their errors, had acknowledged them (which the two Houses did upon their knees)¹ to that most revered father, and by him were received, at the intercession of the king and queen, into the unity and bosom of the church; and that they then made an humble submission and promise, for a declaration of their repentance, to repeal such acts as had been made since the twentieth year of Henry VIII. against the su-

¹ Burn. Ref., vol. ii., 27.

premacý of the pope." Then follows the supplication of the two houses to the king and queen for them to intercede with the cardinal to obtain from the pope a remission of all censures and sentences which they had incurred by the laws of the church, and to be received into the church; all which having been performed, they now proceeded in this statute to accomplish their promise, and repeal all laws made against the supremacy of the see of Rome.

The first repeal was of that part of stat. 21 Henry VIII., c. 13, made against licenses and dispensations from Rome for pluralities and non-residence; then the whole of stat. 23 Henry VIII., c. 9, against citing out of the diocese where a person dwells, except in certain cases; stat. 24 Henry VIII., c. 12, that appeals in such cases as had been used to be pursued to the see of Rome, should not be had or used within the realm; stat. 25 Henry VIII., c. 19, called the submission of the clergy; stat. 25 Henry VIII., c. 20, for non-payment of first-fruits to the see of Rome, and consecration of bishops within the realm; stat. 25 Henry VIII., c. 21, concerning exonerating the king's subjects from exactions and impositions before that time paid to the see of Rome; and for having licenses and dispensations within the realm, without suing further for them. All these statutes are totally repealed: as was stat. 26 Henry VIII., c. 1, concerning the king's highness being supreme head of the Church of England, and to have authority to reform and redress all errors, heresies, and abuses in it; stat. 26 Henry VIII., c. 14, for the nomination and consecration of suffragans; stat. 27 Henry VIII., c. 15, empowering the king to name thirty-two persons, clergy and lay, for the making of ecclesiastical laws; stat. 28 Henry VIII., c. 10, for extinguishing the authority of the see of Rome: stat. 28 Henry VIII., c. 16, for the ease of such as had obtained pretended licenses and dispensations from the see of Rome; all that part of stat. 28 Henry VIII., c. 7, which concerns a prohibition to marry within the degrees mentioned in the act; stat. 31 Henry VIII., c. 9, authorizing the king to make bishops by his letters-patent; stat. 32 Henry VIII., c. 38, concerning pre-contracts and degrees of consanguinity; stat. 35 Henry VIII., c. 3, for the ratification of the king's stile; such part of stat. 35 Henry VIII., c. 1, as concerned the oath against the supremacy; and all oaths thereupon had, made, and given,

were declared to be utterly void and repealed; stat. 37 Henry VIII., c. 17, that doctors of the civil law, being married, might exercise ecclesiastical jurisdiction; that part of stat. 1 Edward VI., c. 12, sect. 7, which punishes those who deny the king's supremacy. That clause and all other clauses in that act contrary to the supremacy of the pope, and all other acts of parliament made since the twentieth of Henry VIII., against the supreme authority of the pope's holiness, are generally repealed.

But lest the repeal of these laws, and the admission of papal authority in all its plenitude, without any saving for such establishments and accidents which had been produced of late years, should bring the property and condition of many into great hazard, and introduce the extremest confusion, it was necessary to go further; and the parliament made another supplication to their majesties to intercede with the cardinal, that the following points should be settled by the pope's authority, *that all occasions, say they,*¹ *of contention, grudge, suspicion, and trouble, may be taken away:* 1st, that all bishoprics, cathedrals, or colleges, now established, might be confirmed; 2d, that marriage made within such degrees as were not contrary to the law of God might be confirmed, and the issue declared legitimate; 3d, that institutions into benefices, and, 4th, all judicial process, might be confirmed; and lastly, that all settlements of land of bishoprics, monasteries, or other religious houses, might continue as they were, without any trouble from ecclesiastical censures or the laws.

A supplication likewise from the clergy² prayed that the lands and goods of the clergy might remain as they were. The cardinal made a dispensation as to all these particulars,³ and granted them fully; which dispensation was now ratified in every point by the parliament. It is, however, in addition to this, enacted⁴ that all persons and bodies corporate, as well as the crown, shall enjoy all the possessions alluded to, as they were entitled to enjoy them before the first day of that parliament; and all assurances of land by Henry VIII. and Edward VI. are confirmed. But to encourage a renewal of like monastic institutions, it was enacted, that persons seized in fee

¹ Sect. 25.² Ibid., 31.³ Ibid., 32.⁴ Ibid., 36.

might give lands to spiritual corporations without license of mortmain or writ of *ad quod damnum*, notwithstanding the statutes of mortmain;¹ with reserve of a tenure in frankalmoigne, or a tenure by divine service, notwithstanding the statute of *quia emptores*: this license to alien in mortmain to continue only for twenty years.

In fine, it was declared that the see of Rome was to have and enjoy such authority, pre-eminence, and jurisdiction, as his holiness did or might exercise by his supremacy (and the bishops such ecclesiastical jurisdiction) before the 20th year of Henry VIII. In this manner was the Roman Catholic religion and the papal authority again established by law.

Having so far considered such statutes as effected alterations in religion, we shall now mention a remarkable one respecting the regal state, and then proceed to those concerning persons and private property, and the administration of justice.

The stat. 1 Mary, sect. 3, c. 1, sets forth, that because the statutes of the realm attributed all prerogatives and pre-eminence to the name of *king*, together with the punishment and correction of offenders; therefore some malicious and ignorant persons had pretended to think that the *queen* could not take the benefit and privilege of them: it then proceeds to make a declaration of the law on this point, and enacts, that the law of this realm is, that the kingly or regal office, with all its dignity, prerogative, and power, being invested either in male or female, ought to be *as fully deemed and taken in the one as in the other*; and whatever the law has appointed the king to have or do, the same the queen may enjoy and exercise without doubt or question.

When the speaker of the House of Commons brought in this bill, many wondered what could be the intention of such a law on a matter which seemed to be without dispute. The secret design of this act was afterwards related by Fleetwood, the Recorder of London, to Lord Leicester, from whose minutes of the story a learned prelate has made it public.² The bill, as first brought in, declared also that the queen had as much authority as *any other of her progenitors*. It was objected to this, that she

¹ Sect. 51.

² Burn. Ref., vol. ii., 258.

was thereby declared to have as much authority as William the Conqueror, and might, like him, seize all the lands of Englishmen, and give them to strangers: this suggestion, together with the jealousy then entertained of the Spanish match, induced the house to go into a committee, where the bill was at length qualified, and made to speak the language above mentioned.

But the original motive for the act was this: a book had been presented to the queen by the imperial ambassador, in which were sketched the outlines of a plan of government for the queen to adopt. She was to take advantage of the notion that all limitations by statute on the regal power regarded kings, and not queens, of England; she was to declare herself a conqueror; *or*, that she succeeded by the common law, and not by statute, which could not, upon the above-mentioned principle, bind her; and thus she was to be at liberty to establish religion and government as she pleased. It is said that the queen, very much to her honor, expressed a dislike of this bold performance, and thought the design contrary to her coronation oath; and having communicated it to Gardiner, in the ambassador's presence, committed it to the flames, with some rebuke of his excellency for presuming to tempt her with such projects. Gardiner was alarmed at this bold beginning of the Spanish influence: and to prevent such designs for the future, he drew this act, in which, though he seemed to intend an advantage to the queen, by putting her title beyond dispute, yet he really meant that she should be restrained by all those laws to which the former kings of England had consented.

We have not had occasion to speak of any parliamentary provision on the article of purveyance since the time of Edward III.¹ The only object had since been, to procure a due and regular execution of those acts, without making any new ones.² As a popular measure, in the reign of Edward VI., the operation of purveyance was suspended for three years, except for barges, ships, carts, and things necessary for carriages: it was provided, that for post-horses a penny a mile should be paid; for carts fourpence, if for the household; if for the wars, threepence.³ This act, however, had no long continuance: but in the next

¹ *Vide* vol. iii.

² *Ibid.*

³ Stat. 2 and 3 Edw. VI., c. 3.

reign some regulations of a permanent nature were made on this head. It was ordained by stat. 2 and 3 Philip and Mary, c. 6, that no commissions of purveyance should be for any more than six months: they were to contain the counties within which the purveyance was to be made, and opposite each county blanks, where were to be written the things to be purveyed in each, with their several prices, and the name subscribed of the constables who were employed to procure them, and were privy to their delivery; a docket of which, subscribed by the commissioner of purveyance, was to be lodged with the several constables upon the delivery; who were to give it to the justices of the place; and they were to certify the contents of such dockets to the stewards of the household. All former statutes against purveyors and takers were thereby extended to their undertakers, deputies, and servants; and all commissions for purveyance were henceforward to be in the English language. By another chapter, of the same statute,¹ it was ordained, in conformity with an ancient privilege of the two universities, that there should be no purveyance within five miles of Oxford or Cambridge, except when the king or queen came there.

We have seen the state of our criminal law at the time of Queen Mary's accession, when a statute was made similar to that passed at the beginning of Edward VI.'s reign, to abolish all new-created treasons and felonies, though the repealing act of Edward VI. and the mildness of that reign had left very little occasion for such a statute. However such a beginning had some small effect in conciliating the mind of the nation to her government till another spirit could with more safety discover itself. The preamble of the act, in stating a reason for it, seems to glance at the 5 and 6 Edward VI., c. 11; for it says, that many honorable and noble persons have of late, for words only, without other opinion, fact, or deed, suffered shameful death not accustomed to nobles, to remove the occasion of which in future the queen was pleased that no act, deed, or offence, being made treason, petit treason, or otherwise, shall be so deemed, but only such as is so declared by stat. 25 Edward III. And again, that all offences made felony (not

Repeal of treason, felony, and præmunire.

¹ Ch. 15.

being felony before) or appointed to be within the case of præmunire, by any act made since the first day of Henry VIII.'s reign, shall be repealed and void.

Thus was the description of treason once more reduced to the words of the statute of Edward III., and the few felonies made in the last reign were abolished. But, notwithstanding this appearance of clemency, some treasons and felonies were very soon enacted by parliament. In the next session of that same parliament it was ordained by stat. 1 Mary, s. 2, c. 6, in protection of a species of coin for which no law had before provided, that persons who counterfeited gold or silver coin, not the proper coin of this realm, but current with the queen's consent (and by stat. 1 and 2 Philip and Mary, c. 11, those who bring such coin into the realm), shall be adjudged traitors; as also those who counterfeited the queen's sign-manual, privy signet, or privy seal; for the statute of Henry VIII. concerning these seals was repealed by the general clause of the former law.

In the same session an act was made against riotous assemblies, and to repeal the law made for the like purpose in the last reign.¹ This is stat. 1 Riotous
assemblies. Mary, s. 2, c. 12, which, together with that of Edward VI., deserves notice, as they furnished a model for a similar one made in later times, with this difference, that those of Edward and Mary inflicted only the penalty of single felony, that of George I. of felony without clergy (*a*). The

(a) This statute and the statute 1 George I., the Riot Act, by which it was substantially revived, were designed to give a more summary and effectual remedy than the common law allowed with reference especially to the use of armed force and deadly weapons for the suppression of riotous and unlawful assemblies. The first statute on the subject (27 *Rich. II.*, c. viii.) required the sheriffs and other the king's officers to suppress riots and imprison rioters; and the statute 13 Henry IV., c. vii., required the justices of the peace, with the sheriff, by the power of the county, immediately to suppress riots, and arrest the offenders (3 *Hen. IV.*, c. vii., *vide* vol. iii.). And other statutes directed inquiry (3 *Hen. V.*, c. ix.; 9 *Hen. VII.*, c. xiii.). But the defect of the statutes as to suppression of riots was that in case of resistance by the rioters, and the absence of evidence of felonious or traitorous intention, it was doubtful whether it was allowable to use deadly weapons, and to kill and slay the rioters. That difficulty was met by the present statute and the more modern Riot Act, the essence of which is to allow of the use of armed force and deadly weapons, not directly or expressly, but indirectly and impliedly, by declaring the rioters felons, whereby they became liable to the common-law rule, that a felon resisting apprehension may be slain, and the other rule of the common law, that all persons, armed or not, may,

¹ *Vide ante*.

act in question declares it felony for any persons to the number of twelve being assembled together, to intend or

and indeed must, aid the officers of the peace in arresting felons, the effect of which was to enable the magistrates or officers of the peace to call upon the military to act with armed force in arresting or dispersing the felonious rioters; and if any of them are slain, it is justifiable homicide. The present statute, it is to be observed, was confined to cases of riots with certain criminal and unlawful intents. The Riot Act, 1 George I., was far more stringent. It enacted that in case of twelve persons or more, riotously assembled, continuing together an hour after proclamation made by a justice of the peace, etc., to disperse, they are guilty of felony (1 *Geo. I.*, c. vi.). The words of the act are, "That if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together in disturbance of the peace, and being required by a justice of the peace or sheriff or mayor, etc., to disperse themselves, shall unlawfully, riotously, and tumultuously remain together for an hour after such command by proclamation, they shall be adjudged felons, and suffer death; and that any peace-officer, and any such other person as shall be commanded to be assisting, are empowered to seize and apprehend such rioters; and if any of the rioters shall happen to be killed in the dispersing, seizing, or apprehending them, by reason of their resisting the persons dispersing or apprehending them, then all persons so killing them are indemnified" (1 *Geo. II.*, c. viii.). This statute, as a learned author long ago pointed out, being wholly in the affirmative, does not take away any part of the authority before given by the common law for the suppression of riot (*Hawkins's Pleas of the Crown*, b. i., c. lxxii.). But the common law, although it allowed of the use of armed force and deadly weapons when necessary for the immediate resistance or prevention of felony or dispersion of a treasonable or a felonious assembly, did not authorize such measures for mere suppression of an assembly only unlawful and riotous. It was long ago held that an armed rising to quell a treasonable riot is lawful, and no information is to be granted for petty irregularity in so doing (*Rex v. Wigan (Inhab.)*, 1 *W. Black.*, 47). Although a man may arm himself and his friends for the defence of the possession of his house against such as threaten to make an unlawful entry, he cannot lawfully do the same in defence of his close (*Rex v. Bangor (Bishop)*, 1 *Russ. C. & M.*, 225 — *Heath*). It is the more important to bear in mind what the common law is on the subject, because the Riot Act, being highly penal, is very strictly construed, so that the omission even of formal words in the proclamation will be fatal to an indictment for felony against the rioter (*Rex v. Child*, 4 *C. & P.*, 442), though it would not follow that though it might render the killing of him illegal, the killing would be felonious and murderous. A magistrate may assemble all the king's subjects to quell a riot, and may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. At the time of a riot, a magistrate may repel force by force, before the reading of the proclamation from the Riot Act (*Rex v. Kennett*, 5 *C. & P.*, 282, n.). But it is one thing to repel force by force — *i. e.*, to resist force used against those thus engaged; in other words, to use force in self-defence — and to attack a riot with armed force and deadly weapons. If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty by him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather than apprehend the rioters, his sole care was for himself, this is also neglect (*Ibid.*).

go about with force and arms, and of their own authority to change any laws; and, being commanded by the sheriff,

It has certainly been laid down in our own times that the general rules of the law require of magistrates, at the time of a riot, that they should keep the peace, and restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them; and all the king's subjects are bound to do so upon reasonable warning. In point of law, a magistrate would be justified in giving fire-arms to those who thus come to assist him, but it would be imprudent in him to do so (*Rex v. Pinney*, 5 C. & P., 254. *At bar in K. B.*). There can be no doubt that it is lawful at common law to use armed force if necessary for the prevention of felony, or the resistance of persons in the act of attempting to commit felony. Thus the law was laid down in our own time: "If it is necessary for the purpose of preventing mischief, or for the execution of the law (as in effecting an arrest by the civil authority), it is not only the right but the duty of soldiers to exert themselves in assisting the execution of legal process, or to prevent any crime from being committed. A soldier is bound by all the duties of other citizens, and gifted with all the rights of other citizens, and he is as much bound to prevent a breach of the peace or a felony as any other citizen. The contrary notion had prevailed, and through this mistake, soldiers, with arms in their hands, stood by and saw felonies committed, houses burned and pulled down before their eyes, by those whom they might lawfully have killed, if they could not otherwise prevent them" (*Burdett v. Abbot*, 4 *Taunton's Reps.*, 449). This seems accurately to express the limits of the common-law power of using armed force and deadly weapons for the purpose of killing and slaying rioters; that is to say, they must be actually engaged in felonious outrage, or they must be assembled in prosecution of a treasonable purpose and intent; in which latter case they are levying war against the crown, at least if they have weapons of any kind, or are trying to obtain them. The former class of cases appear to have been in the view of the legislature when the present act was passed. Therefore various similar cases, but not felonious, are added and specified.

The modern Riot Act does not require any specific intent on the riotous and unlawful assembly, but makes it felonious after a certain amount of persistency. There is a distinction at common law, however, between an unlawful assembly and a riotous assembly; and there may even be a riotous assembly without any criminal purpose or intent; and so there may be a riotous and unlawful assembly, not such as to create any present danger or terror. An assembly of great numbers of persons, which, from its general appearance and accompanying circumstances, is calculated to excite terror, alarm, and consternation, is generally criminal and unlawful (*Rex v. Hunt*, 1 *Russ. C. & M.*, 254). In case of a riotous assembly, constables, and even private individuals, are justified in dispersing the offenders, and, if they cannot otherwise succeed in doing so, they may use force. Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence (*Rex v. Furzey*, 6 C. & P.). But it is one thing to attempt to disperse an assembly by the use of the ordinary weapons of a peace-officer, and another thing to kill and slay the rioters. A man may be a rioter and yet not guilty of an assault; nor is every riot such as to cause terror or danger. Thus twelve persons were indicted for a riot and assaulting a person. The indictment did not conclude *in terrorem populi*. Several of the defendants had been convicted, and there was evidence that they had joined in the riot, but there was no proof of any assault. Held, that as there was no proof of an assault as against the defendants, the defendants could not be convicted of the riot only, as the indictment did not conclude *in terrorem*

or by any justice of the peace, mayor, or bailiff of any town or city, by proclamation in the queen's name, to re-

populi (*Rex v. Hughes*, 4 C. & P., 373). If persons be charged with a riot, and cutting down fences, and the indictment do not conclude *in terrorem populi*, they cannot on that indictment be convicted of a riot, but may be convicted of an unlawful assembly (*Rex v. Cox*, 4 C. & P., 538). If parties assemble together for a purpose, which, if executed, would make them rioters, but, having assembled, they do nothing, and separate without carrying their purpose into effect, this is an unlawful assembly (*Rex v. Birt*, 5 C. & P., 154). These cases may illustrate the difficulties which arise at common law in dealing with tumultuous assemblies. But by the Riot Act, 1 George I., stat. ii., c. v., these difficulties are obviated, provided the act be preserved. Thus, for instance, if there be such an assembly that there would have been a riot if the parties had carried their purpose into effect, this is within the statute; and whether there was a cessation or not, is a question for the jury. So an indictment on the Riot Act, 1 George I., stat. ii., c. v., s. 1, for remaining assembled one hour after proclamation made, need not charge the original riot to have been *in terrorem populi* (*Rex v. Warren James*, 5 C. & P., 153). And it is prudent to resort to the Riot Act before armed force is used. It has been held that private persons may arm themselves to suppress a riot; and it seems to follow that they may make use of arms if necessary. However, it may be very hazardous for private persons to proceed to such extremity, and such violent means seem only to be proper against such riots as savor of rebellion (*Russell on Crimes*, 40). A justice called upon to suppress a riot, is required by law to do all he knows to be in his power that can reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances. Mere honesty of intention is no defence, if he fails in his duty. Nor will it be a defence that he acted upon the best professional advice that could be obtained, on legal and military points, if his conduct has been faulty in point of law (*Rex v. Pinney*, 3 B. & Adol., 946). To constitute the crime of levying war against the crown, which may justify the resort to arms, there must be force accompanying it, and it must be for a general object; and if an armed body attack the military, this is that crime (*Regina v. Frost*, 9 C. & P., 129). But there may be assemblies even treasonable with a view to the levying of war, which, though exposing the persons assembled to arrest, and rendering them liable to be killed if they resist arrest, may not justify the killing of them without attempt to arrest them. On the other hand, any unlawful assembly may be dispersed. It is not only lawful for magistrates to disperse an unlawful assembly, even when no riot has occurred, but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty (*Regina v. Neale*, 9 Carrington, 8; *Payne's Reps.*, 431). Any assembly of persons attended with circumstances calculated to excite alarm is an unlawful assembly (*Ibid.*). The mode of dispersing an unlawful assembly may be very different according to the circumstances attending it in each particular case. An unlawful assembly may be so far verging towards a riot that it may be the bounden duty of the magistrates to take immediate steps to disperse the assembly; and there may be cases where the magistrates will be bound to use force to disperse an unlawful assembly (*Ibid.*). Any rioters or unlawful assembly may be thus dispersed; and in the absence of any definition of what shall be a riot within the meaning of the Riot Act, the common-law definition of a riot must be resorted to; and in such case, if any of the queen's subjects are terrified, this is a cause of terror and alarm to substantiate that charge (*Regina v. Langton*, 1 C. & M.). By the common law every private person

tire to their houses, to continue together for one hour after such commandment, or to attempt any of the above-mentioned facts; and if persons to the number of twelve should go about to overthrow pales, hedges, ditches, or other inclosures, the banks of any fish-pond, or conduits for water, to the intent the same should lie open; or to have common there; or to destroy deer or conies; or to pull down any houses, barns, mills; or to burn any stacks of corn; or to abate rents of lands or price of victuals, and should refuse in like manner to depart after proclamation, it was made felony. The raising of people to the number of twelve, by ringing of bells, sound of trumpet, or in any way, was likewise made felony, if the persons so met together came within the former clauses of the act; and if the *wife*, servant, or any other relieved any persons, so assembled, with *victuals*, weapons, or other things, they were to be deemed felons. Thus far of riots committed by twelve persons. If the like offences were committed by persons above the number of two, and under that of twelve, they were to be imprisoned for one year; and finally, it was ordained, in a more comprehensive manner, that if persons to the number of forty assembled for the above purposes, or to do *any other felony or rebellion*, and so continued together for three hours after proclamation, they should be adjudged felons; and any copyholder or farmer being required by the king's officer to assist in suppressing such offenders, and refusing so to do, was to forfeit his copyhold or lease during his life. This act was only temporary, and soon expired (a).

Some other of the penal laws of this reign were only temporary, and expired at the demise of the crown. Such was stat. 1 and 2 Philip and Mary, c. 3, concerning reporters of news. The execution of stat. 3 Edward I., c.

may lawfully endeavor on his own authority, without the authority of a magistrate, to suppress a riot by every means in his power. He may disperse or assist in dispersing those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop others whom he may see coming from joining the riot. If the riot is dangerous, he may arm himself against evil-doers; and if the occasion demands immediate action, it is the duty of every subject to act for himself in suppressing riotous and tumultuous assemblies; and he may be assured that whatever is done by him honestly in the exercise of that object will be justified by the canon law. Nor is there any difference in this respect between soldiers and private citizens (*Tindal, C. J., Simmons on Court-Martial, 552*).

(a) But was renewed in 1 George I., c. ii.

34, and of Richard II., stat. 1, c. 5, was thereby referred to justices of the peace; and it was moreover enacted that any person convicted of speaking maliciously any slanderous news of the king or queen, should, for the first offence, be set in the pillory, and have both his ears cut off (unless he paid £100), and suffer three months' imprisonment; and if slanderous news were spoken of any common person, there was the same punishment, except that the imprisonment was to be only for one month; and if it was by book, rhyme, ballad, letter, or writing, the offender was to have his right hand stricken off; and for the second offence, he was to suffer imprisonment during life and forfeiture of all his goods. The queen's jealousy of offenders of this kind was such, that an act was made in the same session¹ which declared that "persons who *have* by express words *prayed*, or hereafter shall pray, that God would shorten the queen's days, or take her out of the way" (as the conventiclers in London were then said to have done), "should be deemed traitors;" but, with respect to offenders, who had committed this crime during that session of parliament, and were indicted, such persons might, upon their arraignment, submit themselves to the queen's mercy, and then no judgment was to be passed, which *proviso* took off the edge, in some degree, of this *ex post facto* law.

But the next act,² of the same session, went further; for, complaining that "the late clemency of the queen, in relaxing penal laws, had given occasion to many *cankard and traitorous hearts* to imagine and attempt things against the government;" some provisions were now again made in the spirit of several acts of³ Henry VIII., and of one in the late reign. If any, by open preaching, express words or sayings, did compass or imagine to deprive the king of his style and honor, or to destroy him, or to levy war against the king or queen, or did maliciously or advisedly say that the king ought not to have such title and style, such offender was to forfeit all his goods and issues of his lands during life, with perpetual imprisonment; and for a second offence, he was to be adjudged a traitor. To do the same by writing, printing, overt deed or act, was made high treason in the first instance. There is another treason made to protect the king's person if he should survive

¹ Cap. 9.² Ibid.³ *Vide ante.*

the queen, and continue governor to the child of which the queen was then supposed to be pregnant. This act contains two clauses concerning trials for treason, which we shall hereafter mention. It requires that indictments for words, under this act, should be brought within six months; and now again declares, what had been twice decided by statutes in the reign of Edward VI., that concealment of high treason shall only be misprision of treason.

These are all the penal statutes made respecting the government, in which we see more caution and moderation than in those of Henry VIII., from which they were copied, though they went a little further than those on the like subject in the reign of Edward VI. The remaining statutes regarded common offences, and were, one concerning Egyptians, another respecting accessaries in certain felonies, and the last about the stealing of maidens.

The statute of Henry VIII.,¹ made against Egyptians, or gypsies, was found not strict enough to restrain those people from coming into the kingdom; but many still resorted hither, using, as the present act says, "their old accustomed devilish and naughty practices and devices, with such abominable living as is not in any Christian realm to be permitted, named, or known." It is therefore enacted, by stat. 1 and 2 Philip and Mary, c. 4, that any one conveying such person into the realm shall forfeit £40; and the Egyptian so conveyed, and continuing here one month, shall be adjudged a felon without benefit of clergy or sanctuary. As to those within the realm, such as do not depart within twenty days after proclamation of that act, shall forfeit all their goods, to be seized by any one, half to the king and half to the party seizing them: and if they do not depart in forty days after the proclamation, it is made felony without clergy or sanctuary. Persons who leave that way of life within the twenty days above mentioned, are to be discharged of the penalties of the act.

The licenses to keep gaming-houses which were sanctioned by the statutes of Henry VIII. (a) were grossly

(a) At common law, keeping a common gaming-house was illegal (*Rex v. Rogers*, 1 B. & C., 272); so of a disorderly house (*Rex v. Higginson*, 2 Barr, 1232). Statutes were only necessary to enable the justices to require licenses, which would only be proper for lawful houses.

¹ *Vide ante*.

abused, and became the source of much evil. To remedy this, it was enacted by the stat. 2 and 3 Philip and Mary, c. 9, that every license, placard, or grant, for the keeping of any bowling-alley, dicing-house, or other unlawful games, should be null and void (*a*).

Stat. 4 and 5 Philip and Mary, c. 4, to which we have before alluded, takes away clergy from accessaries before the fact in the following offences: In petit treason, wilful murder, robbery in any dwelling-house or houses, robbery in or near any highway, the wilful burning of any dwelling-house, or any part thereof, or any barn, then having corn or grain in the same. Clergy is taken from all these offenders, being outlawed, or being otherwise attainted or convicted, or standing mute of malice, or challenging peremptorily above twenty persons or not answering directly to the offence. This act was made as a supplement to stat. 1 Edward VI., c. 12, which had taken away clergy from the principals in all these crimes. But in addition to the statute of Edward VI., this act provides for the case of *burning of houses*, which that act had omitted. The arguments and consequences which have been founded on this particular circumstance, have been fully considered before.¹

To this statute is added a clause which is to be found in several laws of these two reigns, that lords of parliament and peers shall be tried by their peers for any offence mentioned in this act, as hath been accustomed by the laws of the realm; a caution which probably was occasioned by some doubt then subsisting whether that privilege was allowed in new-made felonies and treasons, though one should think it was sufficiently secured by the terms of Magna Charta.²

The stat. 4 and 5 Philip and Mary, c. 8, was intended to carry further the policy of the statute of Henry VII.,³ respecting the stealing of heir-esses (*b*). As that act only punished a man who com-

Stealing of
women.

(*a*) The policy of this statute was carried out by more modern acts, as 25 George II., c. xxxvi., for punishing persons keeping disorderly houses, etc.; 9 Anne, c. xiv., as to gaming.

(*b*) This statute, like most other old statutes of the criminal law, has been.

¹ *Vide ante*, 47-53.

² *Nullus liber homo, etc., etc., nisi per iudicium parium suorum*, cap. 29. *Vide* vol. ii.

³ *Vide ante*.

mitted such an act against the consent of the woman, this statute was to restrain the like indecorum even in some instances where she did consent. It is enacted that if any person above the age of fourteen years shall unlawfully convey, or cause to be conveyed away, any woman-child unmarried, within the age of sixteen years, out of the possession, and against the will of her father or mother, or of such person as then shall happen to have by any lawful means the order, keeping, education, or governance of any such child, he shall suffer two years' imprisonment, or else pay a fine to be assessed in the Star Chamber.

Again, if such person shall so deflower such woman-child, or by secret letters, messages, or otherwise, contract matrimony with her (except with consent of such as have title of wardship), he shall suffer imprisonment for five years, or else pay a fine, to be assessed in the Star Chamber—one moiety to the king, the other to the party grieved. Besides this, it was provided that if any woman-child above the age of twelve and under sixteen years, consent to such contract, then the next of kin, to whom the inheritance shall come after her decease, shall immediately enjoy all her lands in possession, reversion, or remainder, during the life of such person as shall so contract matrimony. The offences herein described are to be heard and determined in the Star Chamber, on a bill of

superseded by more modern enactments. By stat. 9 George IV., c. xxxi., s. 19 and 20, 3 Edward I., c. xiii., 3 Henry VII., c. ii., 39 Elizabeth, c. ix., 4 and 5 Philip and Mary, c. viii., and 1 George IV., c. cxv., are repealed; and also so much of the stat. 6 Richard II., s. 1, c. vi., as relates to this subject. It was held that the decisions on the older statute, however, remain applicable so far as they illustrate the general principles which govern the law on the subject. On a prosecution on the stat. 3 Henry VII., c. ii., it was essential that there should be a continuance of the force into the county where the defilement took place (*Rex v. Gordon*, 1 Russ. C. & M., 572). In cases of this kind the wife is a witness as well for as against her husband, although she has cohabited with him from the day of the marriage (*Rex v. Perry*, 1 Russ. C. & M., 577). Where several defendants were indicted for a misdemeanor in conspiring to carry away a young lady, under the age of sixteen from the custody appointed by her father, and to cause her to marry one of the defendants; and, in another, for conspiring to take her away by force, being an heiress, and to marry her to one of the defendants (*Rex v. Wakefield*, 2 Russ. C. & M., 605). Although the woman is taken away as well as married with her own consent, yet, if this be effected by means of any fraud practised upon her to induce her to go with the offender, and to consent to marry him; semble, that he is equally within the act, for her mind being in a state of delusion by means of the fraud, she cannot be considered as a free agent to give any consent (*Rex v. Wakefield*, *Dea. C. L.*, 4).

complaint or information, and before the justices of assize, by inquisition or indictment.

These are all the statutes which were made concerning crimes in the reign of Queen Mary and her consort. It remains now to speak of such as regarded the method of bringing offenders to justice, and what had been ordained in these two reigns respecting witnesses, particularly in trials of treason.

We have seen that the first statute which empowered justices of the peace out of sessions to let to bail, was the statute of Richard III.¹ This was intended in relief of the subject against malicious imprisonment upon slight accusations; but as this authority was entrusted only to one justice, it was thought proper by stat. 3 Henry VII., c. 3, to repeal this act, and give the same jurisdiction to *two at least*, one to be of the *quorum*, who were to bail persons mainpernable by law, till the sessions or gaol-delivery, and to certify thither such bail, under the penalty of £10. However, the restrictions of this statute had been disregarded, and the authority to let persons to bail had been abused. For though the act requires two justices at least to discharge this office, it became usual for one to take the bail, and insert the name of a brother justice, who was seldom present. By this practice the business was conducted neither with the solemnity nor caution which was required; and it often happened that persons not properly bailable were let to bail, under pretence that the charge amounted only to suspicion. To remedy the former inconveniences, several provisions were made by stat. 1 and 2 Philip and Mary, c. 13. First, as to the question of bail, who are and who are not entitled to that indulgence, it ordains that stat.² Westm. 1, c. 15, shall in future be the law of bail and mainprise. Secondly, that what passes before the justices may be known and examinable afterwards, it directs that when any one is brought before them on a charge of manslaughter or felony, or suspicion thereof, they shall take the information of those who make the charge against the party in writing, and shall also take the examination of the party accused (a), which is the first authority given by our law

(a) Under this act and the similar enactment in 7 Geo. IV., c. lxiv., s. 2-5, it was held (even without any express enactment to that effect), that in all

¹ *Vide ante.*

² *Vide vol. ii., c. ix.*

to examine a man as to his own criminality, it being generally held that *nemo tenetur prodere seipsum*. These examinations are to be certified to the next gaol-delivery. The two justices are required to be present at this bailment, which is to be certified also to the gaol-delivery; but one only may take the examination, and not till then can the accused be admitted to bail.

In like manner all coroners are directed to put into writing the material evidence given upon the inquest; and both they and justices of the peace are empowered to bind witnesses by recognizance to give evidence on the indictment; and such bonds and inquisitions are to be certified in like manner as the examination and bailment. In default of this, the coroners and justices are liable to be fined by the justices of gaol-delivery.

As these provisions concerning examinations were by the above statute ordained only in cases where the party was let to bail, it is enacted by stat. 2 and 3 Philip and Mary, c. 10, that they shall be taken where the person accused is committed to custody. It is to be observed that the county of Middlesex and city of London are not within stat. 1 and 2 Philip and Mary, c. 13.

We shall now speak of the three statutes of Edward VI. and Queen Mary, concerning witnesses in cases of treason, the fate of which statutes has Of witnesses in treason. been very singular, being disregarded while in force, and even supposed to be repealed, till, having long lain dormant, they were, upon further consideration, held to be in force, again esteemed as repealed, and at length regularly observed, and looked upon as a part of our criminal law. During these reverses, they were considered in various lights, and underwent very different constructions. To understand, therefore, the operation these statutes have been held to have on one another, it will be necessary to

cases of examinations of witnesses in cases of felony under these statutes, where they were taken in the presence of the accused, and he had the opportunity of cross-examining them, the depositions of any such witness might be read in evidence against the accused on his trial, in case the person who made the deposition was dead (*Hale's Pleas of the Crown*, 305), or kept out of the way by the procurement of the defendant (*R. v. Morley, Keilw.*, 55), or so ill as to be unable to travel (1 *Hale*, 305; 2 *Hale*, 42); but not if it merely appeared that the witness was absent and could not be found (*Keilw.*, 55). Nor could depositions be read on an indictment for high treason (5 and 6 *Edw. VI., Foster's Crown Cases*, 337).

look beyond the present reigns to those times when this point was more fully debated.

It is the opinion of Lord Coke, though perhaps not well founded, that two witnesses were required on a trial of high treason at common law. Whether this supposed rule had been violated in some recent instances, and a confirmation of it by parliament was thought expedient; or, as others think, and history proves, one witness (or no witness)¹ had been held sufficient to prove this, as it was to prove any other crime; whatever might be the occasion, it was ordained by stat. 1 Edward VI., c. 12, and by stat. 5 and 6 Edward VI., c. 11, that no person shall be indicted, arraigned, condemned, convicted, or attainted for any treason, petit treason, or misprision of treason, unless he be thereof accused by two sufficient and lawful witnesses, as the first statute says, or two lawful accusers, as the latter expresses it; to which it is added by the latter statute, that they shall, upon the arraignment, if living, be brought in person before the accused, to avow and maintain what they have to say. After these two statutes, the stat. 1 and 2 Philip and Mary, c. 10, enacts generally that all *trials* for treason shall be had and used only according to the due order and course of the common law of this realm, and not otherwise. The question which has arisen upon this statute is, what operation it has upon those two statutes of Edward VI. The opinions upon this question have been various at different times.

We find, very soon after the statute had been passed, namely,² in 2 and 3 Philip and Mary, and more solemnly in the 4th year, the judges came to a resolution that the statute of Edward VI. was repealed by that of Philip and Mary. But they considered this repeal as partial, and founded a distinction upon the particular wording of the last act. The statutes of Edward VI., requiring two witnesses to indict, arraign, convict, and attain; the statute of Philip and Mary, declaring that all *trials* for treason shall be according to the due order and course of the common law; they inferred that, at least upon the *trial*, there was no longer need of two witnesses. The practice of the courts seems to have been established in pursuance of

¹ Because a fact was tried by jurors, and not by witnesses. *Vide* vol. iii.; and Plowd., 13.

² Dyer, 132.

this opinion given by all the judges; for in all the state trials during the subsequent reigns, the statutes of Edward VI. are either forgotten, or, when any argument is attempted to be grounded on them, they are pronounced by the judges as repealed, and no longer in force.

In the reign of Charles I. we find that Lord Coke, in a work published after his death,¹ expresses himself of opinion that the statutes of Edward VI. are still in force. Sir Matthew Hale has given divers contradictory opinions upon this point. In his "Summary,"² he is clear that two witnesses are necessary on the *trial*, notwithstanding the statute of Philip and Mary. In his "Pleas of the Crown," he positively says, that two witnesses are required upon the indictment only, and not upon the trial.³ In another place he reprobates the distinction between the indictment and trial, looking on the indictment as an inseparable incident to the trial, and in truth a part of it.⁴ However, in the same passage, he speaks very doubtfully as to the main question; though a little further on⁵ he speaks of two witnesses being required by the statute, to be examined face to face in cases of treason; which must be meant of stat. 5 and 6 Edward VI. Thus did this great lawyer differ from himself upon this point.

We shall now consider the opinion of Lord Coke; which, being more decisive than that of the former writer, and being that which has been adopted by Sir Michael Foster, may be considered as closing this question. After discussing such points as had been made on these statutes by those who went before him, he proceeds to give what he calls his own opinion, upon due consideration of the matter.⁶ He thinks that the stat. 1 and 2 Philip and Mary does not repeal the stat. 1 Edward VI. and stat. 5 and 6 Edward VI. For that statute, says he, extends only to *trials* by verdict; whereas the indictment is no part of the trial, but an information or declaration for the king: *the evidence of witnesses to the jury is no part of the trial; for by law, the trial in that case is not by witnesses, but by the verdict of twelve men; and so there is a manifest diversity between the evidence to a jury and a trial by jury.* When the statute speaks of *trials awarded*, that expression, he says, proves that it had in view the *venire*

¹ 3 Inst., 24, etc.² P. 262.³ 2 H. P. C., 286.⁴ 1 H. P. C., 298–300.⁵ Ibid., 306.⁶ 3 Inst., 26.

facias for trial; for neither the indictment nor the evidence can be said to be *awarded*.¹ Thus far our author has explained himself upon this doubt, in a manner that may be thought extremely technical and refined; but he seems to lay some stress upon it, and to be perfectly satisfied that he is right.

Upon this idea our author goes on, and is of opinion that this statute of Philip and Mary had a very different object from that which had till then been generally supposed.² He thinks it was intended to abrogate all acts of parliament prescribing a different method of trial from that according to the due order and course of the common law. Many provisions introducing new trials had been made in the reign of Henry VIII., and surely never was there a period in our law when a reformation of this kind was more wanted, that the common law might, in this instance, be brought back to its first principles.

To give some instances of these innovations in the course of the common law: It had been ordained by stat. 23 Henry VIII., c. 4, that treasons in Wales, and where the king's writ runneth not, should be tried by special commission in such shires as the king should appoint. By stat. 33 Henry VIII., c. 20, persons confessing treason and afterwards becoming lunatic, might notwithstanding be proceeded against in their absence, and a verdict and judgment given, on which execution might be ordered. By stat. 33 Henry VIII., c. 23, persons charged with treason, or misprision thereof, being examined by three of the council, and vehemently suspected by them, might be tried by special commission in any county: by this act, too, the peremptory challenge of thirty-five, in cases of treason and misprision of treason, was taken away. By stat. 28 Edward III., c. 13, a trial *de medietate* was allowed in treason.

All these acts (and there are several others) introduced a manner of trial derogatory to the due order and course of the common law; he therefore considers *them* as repealed by the stat. 1 and 2 Philip and Mary, c. 10, and the regular and ancient order of proceeding restored.³

¹ 3 Inst., 27.

² This construction of the statute was, however, glanced at by the court in 2 and 3 Philip and Mary, where they held the statutes of Edward VI. to be repealed. Dyer. 136.

³ 3 Inst., 26, 27.

As to the two statutes of Henry VIII. respecting treason out of the realm, and piracy, there is no particular observation made by our author in this place; but in other parts of the same work he speaks of them as still in force. Probably he thought, consistently with former judgments, that as these statutes extended the mode of trial according to the order and course of the common law, in the room of a proceeding by the civil law, it would have been inconsistent with the explanation above given to have supposed these provisions repealed, which so far tended to effect the design ascribed to the statute of Philip and Mary. It was, accordingly, in 2 and 3 Philip and Mary agreed that these statutes, for that reason, were not repealed by the act in question.¹

This opinion of Lord Coke is adopted by Sir Michael Foster, who has added his own thoughts upon the question. He thinks the legislature plainly indicated their opinion concerning the object of the stat. Philip and Mary when by another clause of it they enact, that in all cases of high treason concerning coin current within the realm, or for counterfeiting the king or queen's signet, privy seal, great seal or sign-manual, such manner of trial, and none other, shall be observed and kept, as heretofore hath been used by the common law of the realm, any law, statute, or other thing to the contrary notwithstanding: for, if the former clause had been intended by the legislature to take away the necessity of two witnesses in *all* treasons, why should they have added this to take it away in *some*? It would have been useless and nugatory; whereas it most certainly was meant to effectuate something which was not within the former part of the act. He thinks this is made very clear by the eleventh chapter of the same statute, which enacts, that in cases concerning the coin therein enumerated, offenders shall be indicted, tried, convicted, or attainted, by *such like evidence*, and in such manner and form, as hath been used and accustomed within this realm, at any time *before the first year* of our late sovereign lord King Edward VI., by which clause the matter of evidence is extended as well to the trial as the indictment; and the time seems to be pointed out when two witnesses first became necessary.²

¹ Dyer, 131, 75.

² Fost., 239.

Thus, though not by the common law, yet by stat. 1 Edward VI., c. 12, two witnesses are required both on the indictment and trial for high treason, petit treason, and misprision of treason; and by stat. 5 and 6 Edward VI., c. 11, they are to be brought face to face with the prisoner.

In addition to what has been said respecting this famous statute 1 and 2 Philip and Mary, c. 10, it should be remarked that, after the clause ordaining all trials to be had according to the common laws of the realm, there is another which provides for the trial of treasons *made by that act*, much in the manner and terms used by stat. 5 and 6 Edward VI., c. 11, for it ordains that, upon the arraignment of any treason mentioned in this act, all persons (*or two of them at the least*), who shall write, declare, confess, or depose anything against the person arraigned, shall, if living, and within the realm, be brought forth in person before the party arraigned, *if he require the same*, and object and say openly in his hearing what they can against him, concerning the treasons in the indictment.

In support of Lord Coke's opinion, it may be remarked that the very words of the statute of Philip and Mary, upon which this question arose, are used in stat. 13 Elizabeth, c. 1, in a manner which plainly demonstrates them to have been then understood as he suggests. That act speaks of persons attainted *according to the usual order and course of the common laws of this realm, OR according to the act made in 30 Henry VIII., entitled, an act concerning the trial of treasons committed out of the king's dominions*. This seems like a clear parliamentary exposition of the words, and to be in itself conclusive that they were intended to mark the common-law trial in contradistinction to that and other new ones ordained in the time of Henry VIII.

Upon these statutes arises an observation which none of the above writers have made, but which should be taken into consideration in order to understand this point fully. In the preceding part of this history it has been remarked that the office of the grand inquest was to present offenders on their own knowledge, and that it often happened for a person to be indicted without any one appearing as prosecutor or accuser. When it afterwards became the custom to hear the informations of others, and upon this ground to find the indictment, it was a rule of evidence that the accuser, as he was called, who had preferred the charge to

the grand inquest, should not be a witness to prove the fact in court, because¹ he might be supposed to be in the same mind he was in when he delivered his information, and instead of a confirmation and corroboration, as there ought to be, he could only give the jury a repetition of what he had before said.

A practice like this can only be explained by recurring to the original of the trial by petty jury. We have seen that the petty jury were originally brought as *witnesses*, to declare on their oath their opinion as to the guilt or innocence of the party charged by the indictment. It was, therefore, above all things expedient that no person who either had been of the former jury, or had appeared before them as prosecutor of the indictment, should be allowed to join himself to those who were to try the propriety of *his* act. It was accordingly a rule, established in the reign of Edward I., that no indictor should be on the petty jury.² In process of time, the petty jury used to take occasionally other helps than their own knowledge: they used to read depositions of absent persons, and sometimes hear witnesses; but as these papers or persons were called in merely as assistants to them, and the trial was still considered as preserving the character of the old proceeding unaltered by this innovation, it was nothing more than reasonable that the ancient rule should be still adhered to; and that, as those who had preferred the indictment could not be of the petty jury, so now they should not, in the light of *witnesses*, assist in informing that jury.

This seems to have continued invariably the practice for many years. We have already seen that it was enacted by stat. 25 Edward III., st. 5, c. 3,³ that none of the indictors shall be put in the inquest upon the deliverance; which *indictors*, in the old writers, it should seem, meant as well the prosecutor as the grand inquest. There are many instances in the subsequent period of witnesses challenged because they were indictors.⁴ In the reign of Edward IV., the rule was recognized in cases of felony, though it was said not to hold in misdemeanors, contrary to the opinion in the time of Edward III.⁵ It appears that this rule was still preserved at the time of the statute in question; for in

¹ *Vide* vol. iii.

² *Ibid.*, vol. ii.

³ *Ibid.*, vol. iii.

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⁴ Bro. Chal., 101, 142, 12 and 40 Ass.

⁵ 7 Edw. IV. Bro. Chal., 166.

the 4th and 5th of Philip and Mary it was agreed, amongst other things, by all the judges, that it was a good challenge to a witness to say he was one of the accusers — that is, one of those who were witnesses on the indictment; for, says the book, accusers and witnesses so far differ, that the former offer themselves voluntarily, but the latter do not come till they are called, and therefore an accuser seems hardly unbiassed.¹

This being the prevailing opinion, it is beyond a doubt that a new regulation respecting evidence was made by the statutes of Edward VI. independent of the *number* of witnesses. The very style of stat. 5 and 6 Edward VI., c. 11, seems to intimate that the bringing before the court the accusers who had been examined before the grand jury, was something new. For it enacts, with some earnestness and precision, that “the said accusers, at the time of the arraignment of the party accused, if they be then living, *shall be brought in person before the party* so accused, *and avow and maintain* that they have to say against the said party, to prove him guilty of the treasons contained in the bill of indictment laid against the party arraigned, unless the said party arraigned shall willingly, without violence, confess the same.” If we can rely upon a cotemporary exposition of these statutes of Edward VI. and Philip and Mary, this was the opinion held by the learned of those days. For at a meeting of the judges, to which we have before alluded, in the 4th year of Philip and Mary, they came to the following resolutions amongst others: That, as the repealing statute enacts all *trials* for treason to be according to the order of the common law, and not otherwise; and as a common-law trial is by a *jury and witnesses, and not by accusers*, therefore, upon *trial* of any treason under stat. 25 Edward III. there needed *no accusers*; that is, the witnesses to the grand jury were not to be called on the trial, and brought face to face to the prisoner, according to stat. 5 and 6 Edward VI., though accusers still expected to be at the finding of the indictment.²

As to the number of witnesses, we find, that before the repealing statute, and while the statutes of Edward VI. were unquestionably in force, the effects of these pro-

¹ Bro. Cor., 220.

² Ibid.

visions had been baffled by some singular explanations. It was resolved in the 1st of Mary, that if a person knew the fact of his own knowledge, and told it to another, that other person would make a good second witness, under the statute of Edward VI.; and in the like manner, he who heard it at second or third hand.¹ When such strained interpretations were adopted to get rid of the check put on state prosecutions, while those beneficial laws were in force, we cannot wonder that they so readily availed themselves of this statute of Philip and Mary, and pronounced it a repeal in that respect of the statutes of Edward VI.

When this point was so settled, and trials were conducted in pursuance of it, everything fell back into its old state. These two statutes were the only provisions which had ever been made as to evidence, either defining the quality or number of persons whose testimony should be necessary to prove a fact; and when they were looked on as repealed, we need only turn back to former periods to judge what security was left for persons laboring under the weight of a prosecution for treason. Trials for treason at common law, notwithstanding the boasted security of juries, were a certain mode of destroying a man. Juries seem to have surrendered to the court their right of judging and determining. They used to convict without a single witness, only upon depositions; those sometimes not signed by the party making them, and the contents amounting to nothing but hearsay. They might by law, and they often did in fact, convict upon the arraignment, without anything like proof. This was a serious matter in cases of treason, where passion, prejudice, and interest, carry men so far. The law was the same in all cases of trial by jury, in common felonies, and misdemeanors; but in these instances, it was not pregnant with such bad consequences as in the former; there was not usually that heat in prosecuting; and, in the latter, the judgment did not reach to life.

The statute of Edward VI., in enacting that the accusers should appear at the trial, legitimated a testimony to which before there lay a legal objection; and this provision seemed to be equally expedient for the prosecutor

¹ Dyer, 99 b.

and defendant. The prosecutor, on the credit of whose testimony the bill had been found, gained, by the statute, a right of *avowing and maintaining* what he, most likely, was alone or best able to testify. The prisoner, who was thus enabled to cross-examine the most formidable of the witnesses against him, being those on whose testimony the bill was found, so far obtained a great advantage.

However, though these benefits of the statute were thus for a time defeated, another provision respecting witnesses seems to have had some of those good effects on trials of felonies which this statute was intended to produce in trials of treason. The stat. 1 and 2 Philip and Mary, c. 13, directs justices of the peace to bind by recognizance all persons who declare anything material respecting any felony, to appear at the next gaol-delivery, and to give evidence against the party so indicted, *at the time of his trial*; and, as it is more fully expressed in stat. 2 and 3 Philip and Mary, c. 10, *to give evidence against the party*. These statutes, by providing a compulsory method of obliging persons to give evidence against the party at the gaol-delivery — that is, both on the indictment and on the trial — took away the challenge to accusers, and gave the prisoner that candid and open trial so much to be wished. If we may venture a conjecture, it is, most probably from the time of these two statutes that we are to date the disuse of this challenge to an accuser. This challenge was supported upon the principle, that an accuser was a volunteer, and sort of party, and therefore not entitled to that credit which an indifferent witness enjoyed, who appeared and delivered his evidence under the compulsion of legal process. An accuser was now compelled to give evidence equally with a witness, and stood thereof in the same legal situation.¹ When persons were bound in the same manner to give evidence in cases of treason, there was no reason why the like analogy should not operate with respect to them, and that the evidence of an accuser should in

¹ In the ecclesiastical court, all voluntary preferers to the office were considered as parties. These stood precisely in the situation of persons giving information to a grand inquest, and it was from this idea of canonical jurisprudence that the challenge to accusers was adopted.* Some little confusion may arise from the term, because *accusation* is a mode of ecclesiastical prosecution contradistinguished from those by *inquisition* and *denunciation*, upon which last two the office always proceeded. *Vide ante*.

* An Apolog. for Eccles. Proc., part II., 88.

that case be in the like manner legal and valid. This probably soon became the law and practice; for in the time of Queen Elizabeth, the distinction between an accuser and a witness seemed quite forgotten. A vestige, however, of this old law seems still to remain in the practice of indorsing on the indictment the names of witnesses examined before the grand jury: this, as has been before observed, might originally be intended to show the court who were the *accusers*, and on that account were to be challenged, if attempted to be produced as *witnesses*.¹

After all, notwithstanding the repeal of the statutes of Edward VI. and the many instances which follow in the subsequent reigns of partial and oppressive proceedings on trials, the reigns of Edward VI. and Queen Mary constitute a period when a jury first began to be a fair and effective tribunal, assuming the right of judging for itself; and when persons whose fate was to be determined by their verdict reposed a full confidence in their uprightness, independence, and integrity. There is an instance in the reign of Philip and Mary, where a jury persisted in acquitting a state prisoner,² against the direction of the court, and, it was well known, against the wishes of the sovereign. Whatever judges might pronounce respecting the existing law, it never went from the memory of prisoners that a statute had once expressly declared there should be two witnesses to prove a treason, and that they should be called face to face. As to trials of felony, it was an express recommendation of Queen Mary, at the beginning of her reign, to her judges, that they should suffer prisoners to call witnesses for their defence (a).

The defence of prisoners in all criminal prosecutions

(a) It had long been complained that in suits to which the crown was a party, the subject, whatever were his rights, had no probability of a favorable decision, on account of the superior advantages claimed and enjoyed by the counsel for the sovereign. When Mary appointed Morgan chief-justice of the Common Pleas, she took the opportunity to express disapprobation of this grievance. "I charge you, sir," she said, "to minister the law and justice indifferently, without respect of person; and notwithstanding the old error among you, which will not admit any witness to speak, or other matters to be heard, in favor of the adversary, the crown being party, it is my pleasure that, whatever cases be brought in favor of the subject may be admitted and heard. You are to sit there, not as advocates for me, but as indifferent judges between me and my people" (*State Trials*, i. 72).

¹ *Vide* vol. iii.

² Sir Nicholas Throckmorton.

seemed to depend on the like indulgence, and not upon any right to call witnesses; for in stat. 1 Edward VI., c. 1, st. 6, where a proceeding by indictment before justices of the peace in sessions is directed, it was thought necessary to ordain, that the party arraigned *shall be admitted* to purge or try his innocence by as many, or more witnesses, and of as good honesty and credence, as the witnesses which deposed against him.

Thus many circumstances contributed actually to render this mode of trial a more deliberate and complete examination of a matter of criminality than it had ever been before. While enlarged notions respecting the power and importance of this institution began to prevail, it was more and more considered as independent in some degree of the court, and as having an authority and judicature of its own; the progress of which opinions will be seen in the sequel.

We shall now consider what was done by our courts Witnesses in
treason. in addition to the many alterations that had been made by the legislature in our criminal law. The statutes relating to witnesses in treason are the most striking part of the penal laws in this period, and very few years elapsed before the judges were called upon to come to some resolutions on the construction of them, as has already been treated when we spoke of these statutes. At Sergeants' Inn, in the 4th year of Philip and Mary, the judges came to the following resolution on the statutes concerning witnesses: — That on the trial of treason and misprision of treason there were required by the statutes two accusers or witnesses to the indictment, or sayings and accusations in writing under their hands or the testimony of others to such accusation, which should be read to the jury on the indictment. Should the accusers happen to be dead at the time of the indictment, they held it sufficient if the accusation was there testifying the fact, for then there were two accusers. They held, likewise, that for any treason under stat. 25 Edward III., there needed no accusers at the trial, because it was enacted by stat. 1 and 2 Philip and Mary, c. 10, that all trials for treason should be by the order of the common law, and not otherwise, and the trial by the common law was by jury and witnesses, and not by accusers. The same of treason in coining; there needed no accusers at

the arraignment, but only at the indictment. But they held that in all treasons under stat. 1 and 2 Philip and Mary, c. 10, there ought to be witnesses or accusers as well at the indictment as at the arraignment, pursuant to a clause at the end of that act. Again, in misprision of treason, there ought to be witnesses or accusers, as well upon the indictment as the arraignment, by stat. 1 Edward VI., c. 12, at the end; for stat. 1 and 2 Philip and Mary, before mentioned, repeals accusers at the trial in cases of treason only, and not in misprision. They agreed also, that petit treason ought to be tried as high treason, namely, by accusers at the indictment, but that there needed no accusers at the trial. In these resolutions the following persons concurred; namely, Sir William Portman, chief-justice; Mr. Hare, master of the rolls; Sir Robert Brook, Sir David Brook, Sir Humphrey Brown, Sir John Widdon, Sir Edward Saunders, Sir William Staunforde, and Master Dalison, justices; Dyer, sergeant; and Griffin and Cordell, attorney and solicitor-general. They agreed, also, that counsellors who gave evidence against traitors are not accusers; which was a resolution more in favor of the subject than those which allowed the written accusations to supply the place of *vivâ voce* testimony. It may be added here, from Sir Robert Brook's own words, that by the civil law accusers were as parties, and not witnesses; for witnesses ought to be indifferent, and not come till they are called; but accusers offer themselves to accuse; and conformably with this idea, our law had allowed it as a good challenge to a witness to allege that he was one of the prisoner's accusers.¹

The judges in the above resolutions went on further than to agree upon the number of accusers, and to say that their written accusation would be received as equally legal with their verbal evidence. In a formal trial, in the first year of the queen, it had been held, with regard to the credibility of the accusation, that it was sufficient for one of the accusers to speak of his own knowledge or own hearing; and then having related the fact to another, that other person might be a good accuser under the act. Thus Sir Nicholas Arnold, who accused William Thomas of

¹ We have before observed, that what is here said of accusers is wholly consonant to the principle of criminal proceeding in the canon law. *Vide ante*. New Cases, 76.

treason in speaking words tending to the death and destruction of the queen, and made this accusation upon his own hearing, had, at the request of William Thomas, reported the same to Sir James Croftes; Sir James Croftes reported them to John Fitzwilliam, who was supposed a proper person to be employed to kill the queen; and he told them to Sir Thomas Wiatt: here the court held every one of these persons to be a proper accuser: a determination, which made it wholly unnecessary to repeal the statutes of Edward VI., it being after this in vain to require fifty witnesses; for the same principle would have supplied any number from the knowledge of one alone.¹

In the same year it was declared, at the arraignment of Sir Nicholas Throckmorton, and was repeated in the Star Chamber to the jury (who were arraigned there for their verdict of acquittal), by the opinion of the justices, that where two or more conspired to levy war, or commit any other treason, and one of them executed it, this was treason in all.²

It seemed to be a determination to strain the law of treason, as well private as public. It was laid down this same year, that if a son or daughter-in-law kill a father or mother-in-law, who furnishes board or lodging, and to whom they do necessary services, such a person, if indicted *proditoriè*, should be found guilty of petit treason, though there were no wages paid.³ A case happened where a female servant and a stranger conspired to rob the master, and at the appointed time she admitted him into the house, and conducted him with a candle to her master's bed, where he killed him, the servant doing and saying nothing, but only holding the candle: it was a question, whether the servant was guilty of petit treason, considering the stranger was principal actor, and only guilty of murder. The judges were divided upon it. Portman and Brook, the two chief-justices, with Hare, the master of the rolls, considered it as treason; Brook, chief-baron, with Dalison and Staunforde, justices, maintained the negative.⁴ A similar question had been decided in the affirmative in the time of Richard III. A man having seized on the sea some goods of an enemy, took them into a house, where he was attacked by a person pretending to have an

¹ Mar. Dyer, 99, 68.

³ Dal., 14, 1.

² *Ibid.*, 98, 56.

⁴ 2 and 3 Philip and Mary. Dyer, 128, 57.

authority from the admiral, and supported by a multitude of persons; a woman, without any weapon, issued out of the house, and was killed by one of the persons who came to take the goods, and had thrown a stone at another in the gate. It being a question whether this was murder, the justices and sergeants were divided; some thinking, that if she came out in defence of the house, it was murder in all the persons attacking the house; others, among whom were Brook, Staunforde, and Dyer, thought otherwise, for (say they) no malice was prepensed against the woman, and the imputation of murder cannot be extended further than the party's design. The former supported their conclusion by saying that if two were fighting, at an appointed time and place, and a stranger, interfering to part them, was killed by one of them, this, conformably with some opinions as old as the reign of Edward III., was murder in the slayer; and some thought it was murder in both.¹

A case very much like this supposed one, had really happened in the first year of Queen Mary's reign. This was *Salisbury's case*.² The jury upon the trial put this question, with relation to one of several that were indicted for murder. Whether if the defendant was in company with them who of malice prepense killed the deceased, and when he saw them combating together, took part with them suddenly, without any malice prepense, and struck the deceased, together with the others, he was guilty of murder or manslaughter? to which the court answered, if he had no malice prepense, but *suddenly* took part with those who had, it was manslaughter, and not murder. The fact upon the evidence being, that the intention was not to kill the deceased, but his master, the judge laid down the law upon that head, namely, that killing one man upon a malice conceived against another is murder. There arose another point in this case, which must startle a modern reader, and is well worthy of observation.

We have seen in the reign of Henry VIII. that a man found guilty of manslaughter, on an indictment of murder, was by all the judges held guilty of the whole indictment, and was ac-

Distinction between murder and manslaughter.

¹ 2 and 3 Philip and Mary. Dyer, 128, 60.

² Plowd., 100.

cordingly executed.¹ In the present case, the jury found that Salisbury killed the deceased, but not of malice prepense; and so they acquitted him of the murder, and found him guilty of the manslaughter. Upon this, it was privately debated upon the bench, whether he should be entirely acquitted by this verdict, inasmuch as he was arraigned of murder, and was acquitted thereof; or whether he should have judgment to be hanged for the manslaughter; or, thirdly, whether this verdict should serve for an indictment of manslaughter, or what else should be done: and it was clearly the opinion of the whole court, that they might give judgment against him to be hanged for the manslaughter. In support of this, they said, that the jury might give a verdict at large, and find the whole matter; as if one was arraigned of the death of a man, and he pleaded not guilty, the jury might find that he killed him in his own defence. In this case, therefore, where he was arraigned for killing a man with malice prepense, the substance of the matter was, whether he killed him or not; and the malice prepense was but matter of form, or the circumstance of killing. And though the malice prepense makes the fact more odious, and for this cause the offender shall lose several advantages which he would otherwise have, as sanctuary, clergy, and the like; yet it is nothing more than the manner of the fact, and not the substance. The substance and manner being both put in issue together, if the jury find the substance and not the manner, judgment shall be given according to the substance. Though the court were clear in this opinion, they thought it better, as they were on the circuit, to take the opinion of the sages of the law, and in the meantime they granted a reprieve.² What was finally done in this case does not appear.

This difficulty was occasioned by the late statutes of Henry VIII. and Edward VI., that had taken clergy from those convicted or attainted of murder of malice prepense; since which a distinction had arisen in point of privilege, and so of punishment, between felonious manslaughter and felonious murder with malice prepense. Before these acts, if the jury had acquitted a prisoner of murder, and of the malice, yet there was still a felonious killing con-

¹ *Vide* vol. iv., 538.

² *Plowd.*, 100.

tained in the indictment, which could only be qualified by finding it to be *se defendendo* or *per infortunium*. It appears from our oldest writers upon criminal law, that the only object in prosecutions of this sort was to fix on the defendant the charge of felonious killing, namely, *nequiter et in feloniâ et præmeditato assultu fecit plagam mortalem, etc.*; this was therefore most truly the substance of the charge. Murder was in former times so very distinct a crime from felonious killing that they could hardly be inquired of together; at least murder could never have been a subject of inquiry before the jury who were to try the felonious killing, being always to be inquired of by a presentment of Englishery.¹ We have before seen, that when these presentments were abolished by law, the term *murder* had lost all legal meaning or use, till, by degrees, it crept into indictments, and was adopted, at first, merely to aggravate the charge, which was thought then to sound more malignant, though it was not heightened in the eye of the law. However, such efficacy was attributed to this term, that in time it became, in its adopted sense, as technical as in its old one, and every indictment for felonious killing was required to allege *quodd murdravit*. At length this became the principal charge and gist of every indictment; in the last reign it had been determined to *imply* malice, so that *murdravit* was sufficient, without the addition *ex malitiâ præcogitatâ*;² a suggestion which was more anciently the indispensable requisite of all appeals and indictments for homicide.

When, therefore, *murder with malice prepense* had taken the place, as it were, of felonious homicide, and became the sting of such indictments, the common apprehension must be, that an acquittal of the murder and malice was an acquittal of the felonious killing. But when the statutes of Henry VIII. and Edward VI. had singled out *murder with malice prepense* as a mode and circumstance of killing which should no longer enjoy the benefit of clergy, the judges began once more to separate the legal ideas of murder and felonious homicide; and to say, as on this and another occasion which has been mentioned, that there still remained a felony in the indictment; and though the prisoner was acquitted of the murder, yet if

¹ Vide vol. ii., c. viii.

² 5 Edw. VI. Dyer, 69, 2.

the jury convicted him of killing (without adding the qualification of *se defendendo* or *per infortunium*), they convicted him of felony, for which he should have judgment to die; and to this felonious killing they gave the name of manslaughter, and sometimes chance-medley. The former of these words, it is obvious, was only another term for homicide; the latter was to express a sudden affray, or scuffle, *chaud-melée*; it being under such circumstances that the killing here meant to be signified most usually happened. Conformably with this new construction of the judges, homicide is thus divided by Staunforde, who wrote three or four years after the time of which we are now speaking. He says, that killing a man is either *justifiable* or *se defendendo*, or *per misadventure*; and if it is not one of these three, it is *voluntary homicide*, which he subdivides into two; the more heinous species called *murder*, the less heinous called *chance-medley*.¹

The judges seem to have been governed in their construction of these statutes by technical reasons like those above mentioned; but, however artificial it might be in its commencement, the distinction between murder and manslaughter has been since upheld and explained upon the best and wisest principles of penal justice. A conviction of the frail state of humanity induces one to pronounce it a great defect in our old law, that no allowance was made for the passions of men; if a man was killed in a quarrel, or on a sudden affray, it was equally felonious as if by a deliberate act. But since the time of the above distinction, such an act, which could not be excused under the idea of self-defence or misadventure; nor could, consistent with the feelings of the mind, as well as the dictates of plain sense, be stigmatized with the name of premeditated murder, might yet be subjected to a proportionate punishment, under the name of manslaughter or chance-medley. It follows, that after this change of sentiment, much of what is delivered in our earlier writers and reports on questions of homicide, must be read with great caution as inapplicable to and irreconcilable with the notions which began to prevail from this time to the present day. This is remarkable not only in points that arise about a killing on a sudden affray, but more particu-

¹ Staunf., 19 a.

larly in questions of *se defendendo*; the old law upon which is become almost unintelligible.

To return to the doubt of the judges upon the case before them. Notwithstanding the explicit manner in which they delivered their opinion, that the substance of the indictment was found, and that judgment of death should be given, they could not mean that the manslaughter of which he was convicted, and the murder of which he was acquitted, were the same degree of offence, and were to be equally punished by hanging; for they had themselves stated this difference, that murder was deprived of clergy, but manslaughter was not. It should seem then that the difficulty entirely arose from one of these circumstances—either that the party had deferred demanding his clergy till after judgment of death had been passed, or that he was not a clerk; or that the judges hesitated, not about the fate of the prisoner, but the form of entering the judgment. It is only in one of these ways that the judgment of death here spoken of can be accounted for.

It is remarkable that the definition of larceny given by Staunforde is that which Bracton had formed so many centuries before, and this is laid down and commented on by Staunforde as the law of his time; though this offence, in its legal consideration, had been much altered from the time of Henry III., and an entire new description was made of it, at least by the time of Edward IV., as we have seen in the former part of this history.¹

Robbery is defined by this writer to be, when a man takes anything from the person of another feloniously, though the thing taken be not worth a penny;² a definition which later writers have narrowed, by restricting it to a taking with force, and a putting in fear. It was an opinion of Justice Hales in 7 Edward VI., that it was no felony to take a diamond, ruby, or other stone (not set in gold, or otherwise), because they are not of price with every one, though some hold them valuable and precious.

It was held in 4 Edward VI.³ that the breaking of a house shall not be burglary, unless it is by night. This is the first passage in any book where burglary is confined to a breaking by night.⁴ In the old books it is said to be

¹ Vide vol. iv.² Staunf., 27 a.³ Bro. Cor., 185.⁴ Vide ante.

the same, whether by night or by day. According to this late determination Staunforde has formed his description of this crime, collected from the many decisions since the time of Britton and *The Mirror*, which is to this effect: "*Burglars* are those who feloniously, in time of peace, break a house, church, walls, or towers, though they take nothing from thence; but then it must be done with intent to commit a felony, and in the night."¹ As to the circumstance and kind of *breaking*, the following point was resolved in 3 Edward VI.:² A person was taken in the night putting back the leaf of a window with a dagger: this was held to be burglary. The like was resolved where a man was found drawing the latch of a door, which was not otherwise fastened.³ It was held, that *fregit* alone in an indictment was not sufficient, but it should be *fregit et intravit*.⁴

According to Staunforde's definition, the breaking might be either of a house, church, wall, or tower. It was held in 2 Edward VI., that where a stable was near a house, and inheritable as parcel of a house, and it was broke by night with intent to rob, this was a burglary.⁵

The law of principal and accessary always furnished some subject of argument and difficulty. In a case which happened at Shrewsbury at the same time with the above case of *Salisbury*, it happened that several were indicted for murder, and several others for being present aiding and abetting. The latter were the only persons in custody, and it was submitted by Sir Thomas Bromley, the chief-justice, to the others in the commission with him, whether these men should be arraigned; for although they were principals as well as those who struck the blow, yet they were principals only in the second degree, in respect of the act of the others; and if it should happen that these should be convicted, and then the others be tried and acquitted, a new difficulty and inconvenience would follow; for they would be found guilty of abetting a fact that was never done; and when it is recollected that in the old law persons present aiding and assisting were deemed to be accessaries and not principals, he thought it deserved some consideration. After two days' hesitation, the other justices were of opinion,

¹ *Noctanter*, Staunf., 30 a.

² Lamb. Irenarch, 258.

³ *Ibid.*

⁴ 1 Mar. Dyer, 99, 58.

⁵ New Cases, 75.

that those who were aiding and assisting were in truth and fact, to all intents, as much principals as those who did the fact; for they caused a terror in the party, and thus disabled him from resisting and defending himself, which was the same as giving the stroke; it was therefore not proper to say, that the one were principals in deed, and the others in law, but they are all principals in deed and in the same degree. They said, therefore, that should the jurors give a special verdict, and find that the deceased was struck by another than the person alleged in the indictment to have struck him, and find these guilty of aiding and being present, the verdict would be a sufficient conviction. The same if those who gave the wound should die, the aiders who were present might be arraigned; which shows they were equally principals, and not in the second degree. In this the chief-justice and the rest agreed, and the prisoners were accordingly tried.¹

A man was indicted as accessory both to the principals absent and those present; and Bromley started a doubt, whether he should be arraigned as accessory to the principals now present; for he could not be arraigned as accessory to those absent. If he was arraigned in this way, he might be acquitted of being accessory to those present, and yet he might really be accessory to those who were absent; but could not be a second time arraigned for the same fact; for though being accessory to one is not being accessory to another, yet the fact, which is the death of the deceased, is all one. The justices did not agree to this as a cause for deferring the arraignment, for they said, though he was arraigned as accessory to those present, and should be acquitted, he might well by law be arraigned as accessory to the others; but in conformity with the general practice, and the authority of a case in the book of "Assizes,"² they deferred the arraignment till he could be arraigned as accessory to all the principals together.³ Plowden remarks upon this practice of deferring the arraignment of the accessory till he could be arraigned as accessory to *all* the principals together, that it was more out of good discretion than necessity: it is, says he, to save the country the trouble of furnishing two or three juries, when one might do the whole; and he agrees with

¹ Plowd., 97.² 40 Ass., pl. 25.³ Plowd., 98.

those who said the accessory if acquitted as accessory to one, might afterwards be tried as accessory to the others.¹ We find in 4 Edward VI. two cases, where a man who had been acquitted as accessory, was afterwards indicted of the same felony as principal; and notwithstanding his former acquittal, he was arraigned, convicted, and hanged. It does not appear whether this was an accessory before or after the fact.²

Where five prisoners were arraigned together, and they did not join in their challenges, it was held, that though the arraignments were several, yet as one *venire*, and upon that a *tales*, was awarded for all, therefore a juror challenged by one was held to be drawn against all. But the bench perceiving that the prisoners by thus severing in their challenges, would each have the liberty of challenging twenty jurors, which would exhaust a greater number than those summoned and in the town, and so prevent a trial taking place, they were going to sever the panel, upon the authority of a precedent in the time of Edward IV.,³ so that the same men might serve for five several inquests. The prisoners seeing this, were induced to agree in their challenges.⁴ It was said that a man could not abjure for high treason; there was some doubt whether an offender in petit treason might abjure. There is mention in a chronicle of Henry VI. of a woman abjuring who had killed her mistress; but such writings are deceitful authorities for points of law.⁵

It was enacted by stat. 1 Mary, st. 2, c. 7, that all fines whereupon proclamation has not been duly had, by reason of the adjournment of the term, shall be of the same force under stat. 4 Henry VII., c. 24, as if the term had been regularly holden.

The stat. 35 Henry VIII., c. 6, which gave a *tales de circumstantibus* to a plaintiff, was, by stat. 4 and 5 Philip and Mary, c. 7, extended to any issue to be tried between the king and a private party, or such as pursue any suit for the king and themselves; but such *tales* must be on the request of the king or of the party suing *quitam*.

An explanation was made of the stat. 32 Henry VIII., c. 2, concerning the limitation of actions, as to certain cases where it was often not possible, from the natural

¹ 7 Hen. IV., 107. Plowd., *ibid*.

² New Cases, 75.

³ 9 Edw. IV.

⁴ Plowd., 100.

⁵ New Cases, 78.

course of things, to lay the express seisin or presentment within sixty years. It was therefore declared by 1 Mary, st. 2, c. 5, that that act should not extend to any writ of right of advowson *quare impedit*, assize *jure patronatis*, etc.

The rigid opinions maintained in the last reign against covenants to convey uses were beginning to be somewhat tempered. A question arose upon a covenant of this sort in the reign of Philip and Mary. Sir Thomas Seymour, the lord admiral, who was attainted in the last reign, had covenanted and granted to one Andrew, in consideration that Andrew had conveyed after his death divers lands in fee-simple to Sir Thomas, that he would levy a fine to certain persons of lands whereof the admiral was then seized, to himself for life, remainder to Andrew in tail. No such fine was levied, and it now became a question whether the covenant of itself had changed the use. It was debated at Sergeants' Inn; and it there appeared to Bromley, the chief-justice; Portman, Brown, Saunders, Brook, chief-baron; Whiddon and Guffer; the attorneys, and Sir James Dyer, that no use could possibly be altered by the covenant; for it was future, and the covenant could not now by any possibility be performed. But they in like manner agreed that if *I.*, in consequence of marriage, or for a sum of money, covenant that *N.* should have certain lands, they would change the use presently; because there the estate was not to be made afterwards, as in the case before the judges. It was also agreed that if *cestui que use* willed that his feoffees should make an estate to *J. S.*, in tail or in fee, and then died, yet the use would be completely changed before the estate was actually executed by the feoffees.¹

These concessions were a sufficient foundation for the superstructure that was afterwards raised upon them. Two years after, the following case happened: A covenant was made that the son of *A.* should marry the daughter of *B.*, for which *B.* should give to *A.* a hundred pounds; and *A.* covenanted with *B.*, that if the marriage did not take place, then *A.* and his heirs should be seized of certain lands to the use of *B.* and his heirs *quousque*. *A.* and his heir or executors repaid the hundred pounds; after this *B.* died, and something happened to

¹ 1 Mary. Dyer, 96.

prevent the marriage taking effect; so that it became a question whether the use was changed by the above covenant. And it was held that the use was executed by the statute in the heir of *B.*, notwithstanding *B.* was dead before the refusal of the marriage; for the covenant bound the land with the use in life of *B.*¹

A covenant was made upon consideration of love, favor, and other good considerations, to suffer a recovery to Sir Anthony Wingfield, to the uses mentioned in the deed; which uses were contained in a clause, wherein the said Sir Anthony covenanted and granted for himself and his heirs, that within eight months after the assurance so made, he would make, or cause to be made, an estate to his own mother, for life, remainder to himself and his wife in special tail, remainder to his wife in fee. A recovery was suffered, but no estate made by Sir Anthony; and it became a doubt whether the use was changed by the deed, and the operation of the statute upon it. And it seemed to the two chief-justices, Justice Stamford and Sir James Dyer, that no use was changed by the indenture and recovery only, without an estate being properly executed; for if so, a construction of law would be allowed which might make it impossible for the covenantor to perform his covenant. They not only held no use to be changed under the statute and the deed, but they also added that no subpœna would lie to compel Sir Anthony to carry it into execution, *because* there was a remedy at common law by action of covenant.²

It was not only in the instance of these covenants that the courts of common law entertained scruples of allowing a use to be conveyed, where a plain and obvious intention of the parties to raise a use was discoverable from the transaction and terms of the deed; but we have seen in the former reign, where it was directed that feoffees should take the profits and pay them over to another, that the judges held this not to be a use executed by the statute in the person to whom the profits were to be paid.³ The judges did not then go so far as they did on the present occasion, and declare that no subpœna would lie. It must be confessed that the present is not so strong a case as the former; this being an *executory* covenant,

¹ 3 Mary. New Cases, 137.

³ *Vide ante.*

² 4 and 5 Philip and Mary. Dyer, 162, 40.

and, as such, plainly within the rule which had been laid down upon that head in the repeated decisions of this and the former reigns. However, it will be seen, notwithstanding the Court of Chancery might at this time join with the courts of law, and deny relief in these executory covenants, that in after-times persons were enabled most completely to substantiate these claims in equity *as trusts*, which ought in conscience to be fulfilled.

Origin of trusts.

The like observation may be made on a decision in the latter end of Philip and Mary. It was resolved by the whole Court of Common Pleas, in the case of Jane Tyrrell, that a use could not be limited on a use. Jane Tyrrell bargained and sold land for a sum of money, *habendum* to the bargainee and his heirs forever, to the use of the bargainer Jane Tyrrell for life, and after her decease to the bargainee in tail, remainder to the use of the heirs of the bargainer in fee. It was objected that the uses beyond the *habendum* were all void and impertinent; for a use could not be reserved or raised out of a use; and by the nature of this conveyance, by bargain and sale, a use was first transferred to the bargainee, before any freehold or inheritance was vested in him by the enrolment. The court had before conceived some doubt whether all the uses beyond the first were not mere nullities; and now it was so adjudged by Saunders, chief-justice, and the rest of the court.¹ Here was another occasion for the aid of a court of equity to temper the construction of the courts of common law. In this manner, after the making of the statutes of uses, did the strictness of the judges, in construing those conveyances, drive uses back into the courts of equity. The chancery once more, as in the reign of Henry VI., took up uses where the common law rejected them; and all such uses, with most or all of their consequences, became peculiar objects of that court's jurisdiction, under the idea and consideration of *trusts*, which ought in conscience to be established and fulfilled, though they were not wholly consonant to the rules and course of the common law.

It seemed to be in consequence of the statute of uses that the judges agreed to consider a recovery, where a

¹ 4 and 5 Philip and Mary. Dyer, 155, 20.

cestui que use in tail was vouchee, to be a sufficient bar of the issue.¹ As the statute had put the *cestui que use* in complete seisin of the freehold, he was in the condition of other tenants in tail, and entitled to every advantage which a recovery could furnish for disposing of his estate.

Notwithstanding the determination in the reign of Henry VIII. that no remitter was worked by the execution of the possession to the use,² this point was brought forward again, and argued in the Court of Wards, in 1 and 2 Philip and Mary, in *Townsend's* case. There Sir Roger Townsend, being seized in tail in right of his wife, made a feoffment to the use of himself and his wife for life. Upon the occasion of one of Roger's descendants leaving at his death a minor, an office was found, and amongst other things, the jury found that the wife was in her remitter. It was argued in support of this verdict, not, as

Whether remitter
by a use.

in the former case, that the remitter was wrought by the statute, but that it was a remitter before the act, and the act ought to be no hindrance to it now. They said there were two clauses in the statute of uses, the first of which divests the estate out of the feoffees, and gives it to the *cestui que use* in the same quantity the feoffees had it; the other vests it in such quality as *cestui que use* had the use. So that, notwithstanding the statute put the estate in the wife according to the quantity and quality of the use, yet, when it came to the wife, they said the possession was afterwards changed by reason of her former right; for though the statute gives the seisin in the same quality as the use, it does not say it shall continue so, the statute relating only to the first conveyance, not to the continuance of the use. For supposing the wife had been enfeoffed, the possession would have passed by the feoffment, and the remitter come afterwards: so here the possession is given by the statute, and then comes the remitter; for they repeated that the execution of the use ought not to hinder the remitter.

But it was understood in a different manner by the other side, and was accordingly so decreed by the Court of Wards. They said that the feoffment made by the husband in 29 Henry VIII. was a discontinuance to the wife, for the purging whereof she was driven to her *cui*

¹ Edw. VI. New Cases, 137.

² Vide vol. iv., c. xxviii.

in visâ, and could not avoid it by entry, as she might since stat. 32 Henry VIII., c. 28.¹ And when she had an action given her to recontinue the possession, which she waived, and came to the possession by other means, she ought to take it with such appendages as the law limits to those means, and no otherwise; the means by which she came to that possession, which her husband had taken from her, was the statute of uses; and in whatsoever manner the statute gives her the possession, so it ought to be adjudged to her, notwithstanding she is a feme-covert; for neither coverture nor infancy are excepted in the statute. Now, the estate limited in use to the wife was only for life, jointly with her husband; and as by the statute she could only be in such seisin of the land as she was of the use, therefore she could not be seized in tail. Again, the clause of the statute which limits the seisin to be according to the *quality, manner, and form* of the *use*, will not suffer the wife to be remitted, for she had the use of the new *purchase*; therefore, she must have the land as a purchaser. But if she was adjudged in her remitter, she would be adjudged in by descent, which would be contrary to the statute; and the affirmative words of the statute must, as in all acts, be construed to imply a negative, namely, that the estate can take effect in no other possible manner.

They held, that if the first possession did not work a remitter, there never should be any, where the entry of the party was taken away. But they stated this difference: if a disseizor made a feoffment in fee to the use of the disseizee, and afterwards the disseizee entered, there he shall be remitted by his entry, though before his entry he was not, but was in possession only by virtue of the statute; and when he enters he is adjudged in, not in respect of the statute, but in respect of the disseisin. But in the present case, the entry was taken away by the discontinuance; so that if the first estate did not remit her, her entry or continuance afterwards could not. They reminded them, that when the statute of uses passed, there were many *cestui que use* in fee, who had a right of estate-tail; and when the possession was conveyed to them by the statute, it was the opinion of all the judges that they were not thereby remitted.²

¹ Vide vol. iv., c. xxviii.

² Vide ante.

Thus it was held very early after the statute, that execution of the possession to the use did not work a remitter. The counsel in the present case seemed to be aware of this; and not venturing now, as in the reign of Henry VIII., to argue the contrary, they were content to admit such adjudication to be right; but they contended further, that if the statute did not give, it ought not to hinder a remitter. The above reasoning, however, of those who were against the remitter, went the length of saying, that no remitter could be worked in such case where the entry was taken away. Yet the decree went no further than to say, generally, that the wife was not remitted by force of the use, and the execution of the possession by the statute.¹

The clause in the statute of uses relating to jointures was another new subject of judicial discussion. The statute is particular in describing what estate shall be allowed a sufficient bar of dower. But we shall see the courts went further, and admitted many others as within the equity of the act. No decision upon this part of the statute in the reign of Henry VIII. has come down to us, unless that may be called one, which is reported on the will of Whorewood, the attorney-general.

What jointures
will bar dower.

Whorewood left estates of the value of £360; of which, to the amount of £60, his wife was joint purchaser with him: by his will he declared that his wife should have, during her life, a third part of all his lands and tenements, together with those she had in jointure, to be assigned by his executors, *if it was not contrary to law*. The widow refused her jointure of £60, and demanded £120 as the third part of the whole, in light of a legacy by the will; and also £80 as a third of the residue for her dower. All this appeared in the Court of Wards; but no regular decision seems to have been made upon the point of law; for we are told it was by *agreement* decreed and ordered, that she should have the legacy of £120 and £40 of the residue in lieu of her dower;² so that this case proves nothing. But it is said, that in a similar case in 5 Edward VI., where a manor was devised to enlarge the wife's jointure, and she relinquished her jointure, it was determined she should not have the manor, because, as it

¹ 1 and 2 Philip and Mary. Plowd., 111.

² 38 Hen. VIII. Dyer, 61, 31.

was given for *enlargement* of her jointure, the intention of the testator could not be fulfilled.¹

Respecting the nature of the estate given in jointure, we find it laid down positively *per justitarios* in 6 Edward VI., that wherever a man makes his wife joint purchaser with him, after the coverture, of an estate of freehold (except it is in fee-simple), it shall bar the dower, if she agrees to it after his death. A fee-simple would not answer, because it was not named in the act; and further, they held a devise of land to the wife was no bar of dower; for that was a benevolence, and not a jointure.² It was agreed, that any joint estate of freehold was sufficient, though not named in the act; and in conformity with this opinion, it was decided in the case of the *Duchess of Somerset*, in the beginning of the next reign, that an estate to a man and his wife, and the heirs male of their bodies, was a good jointure: and yet that is not one of the five estates mentioned in the act; and the duchess had there brought a writ of dower, under the idea that such an estate was no bar.³

The remainder of what we have to add of the decisions of courts during these reigns, will relate to the nature and conduct of certain actions, and the alterations that took place in criminal proceedings. Hitherto we have considered actions upon the case as supplying the place of several ancient writs. In the last reign, there is an intimation of one being used instead of the action of debt, in matters of simple contract: this was called an *assumpsit*, from the suggestion of an *assumption* or *promise* made by the defendant, for the breach of which the action was brought. We shall now see this liberal action applied to another object with the same success. It was as desirable to devise some action in the room of *detinue*, as it had been to substitute one in the place of that of debt, the wager of law being a legal method of defence in both. We intimated in the last reign, that a new writ to this effect had been made.⁴ We have now authority to speak more particularly of its nature. A writ upon the case had been framed, which surmised, that the plaintiff, being possessed of the thing in question, lost it; and that the defendant *found it*, and *converted it* to his own use, upon which the action accrued. This, from the suggestion which gave the

¹ Dyer, 61, 31, in the notes.

² B. N. C., 95.

³ 1 Mar. Dyer, 96, 42, and 97, 48.

⁴ *Vide ante*.

cue to the demand, was called an action *sur trover et conversion*, or an *action of trover*; that is, grounded upon a supposed *trover* by the defendant of the thing demanded, and *converting* it to his own use.

The first action in this precise form to be found in our books is in the 4th year of Edward VI.¹ Again, in 2 and 3 Philip and Mary,² there is an action of trover; and from the kind of exceptions taken to the declaration, it should seem that the action was considered as a novelty, and as if it had not been long, or not generally in use: though it must be allowed, that (beside the case in Edward VI.) the actions upon the case above alluded to, in the reign of Henry VIII., are very similar to it. However, it was not till this period that this action was substituted in the place of that of detinue, which from thenceforward became gradually less frequent.

The manner of pleading to this new action of trover was framed like that used in the infancy of other actions upon the case. The plea was drawn specially, pointing at some material allegation, as it was then conceived, in the declaration; and so concluded either to the court or the country. The declaration in the case just before mentioned was this: that the plaintiff was in possession of a chain of gold, which he lost; and that it came *by finding* to the defendant's hands, who sold it, and *converted* it to his own use. To this the defendant pleaded, by traversing the selling *modo et formâ*, as supposed in the declaration; and then concluded with an averment and judgment of the action. To this the plaintiff demurred; and it was held by the court that the plea was good;³ though it was said, that it would have been better to have pleaded *non culpabilis*; which would have answered, said the court, all the misfeasance alleged in the declaration. In like manner, in the action in 20 Henry VII., which was against an executor for goods bailed to his testator, the conversion was traversed.

The reason upon which this kind of pleading was founded, we have before shown, is to be looked for in the old action of detinue. In an action of detinue, in 27 Henry VIII.,⁴ it was held, that if a person came to the possession of goods by bailment, he was answerable upon the bailment merely; but if by *finding* he was chargeable no longer than while he

¹ Bro. *act sur le case*, 113. *Vide ibid.*, 100.

² Dyer, 121, 14, 16.

³ Dyer, 121, 122.

⁴ 27 Hen. VIII., 13.

was actually in possession of them : therefore, in an action of detinue, where a bailment was suggested, the bailment was traversable : and it was the opinion of Shelley that, by the same rule, the trover (and the conversion was the same) was traversable. As the action of trover was grounded upon that of detinue, it was natural that some of its peculiarities in pleading should be copied from the same original.

The debated question,¹ whether assumpsit would lie against executors, was again brought forward in 4 and 5 Philip and Mary. It then received a final determination in the affirmative ; and that judgment has governed the courts ever since. This was in the case of *Norwood v. Read*.

The plaintiff there declared that the testator, in consideration of so much money to him paid by the plaintiff, promised and assumed to deliver to the plaintiff certain quantities of wheat at different days ; that the testator outlived the last day ; and although the plaintiff was ready at the time and place agreed to receive the wheat and to pay for it, the testator did not deliver it according to his assumption ; nor did the defendants (to whose hands sufficient of the testator's goods came to satisfy this and all other demands), since his death, deliver it, but wholly refused. This was the declaration ; and to this the defendant's counsel, relying on the last determination, demurred in law.

Assumpsit
against ex-
ecutors.

In support of this demurrer it was argued that the assumption of the testator was no other than a *simple contract* ; and if the executors should be charged with it, on the same reason should they be charged by every contract executory, as well for debt as for other things ; for every contract executory is an assumpsit in itself. They said it would be inconvenient to charge them as well by contracts *in pais*, as by specialties ; for of the former they could have no knowledge. The court had directed that precedents might be looked for ; many were found, and shown to the court : but the counsel for the defendants said, that in all these the executors had pleaded in bar, and upon the pleas being tried for the plaintiffs, they had recovered ; so they contended this proved nothing against *them*, for they had demurred, and so brought the point directly in issue.

¹ *Vide ante*.

They said it was adjudged, in 13 Henry VI., that if the executor pleaded in bar, where he might have waged his law, he should not have advantage of it in arrest of judgment or in error; the presumption of the law being, that the executor is ignorant of the debt; but when he takes upon him the knowledge of it, by pleading in discharge thereof, it is reasonable he should lose the favor the law intended him: whereas by this demurrer, they said, they took upon themselves no knowledge of the contract, but prayed the benefit the law gave them on account of their presumed ignorance. Thus, not being within any of the precedents, there was but one case against them, and that was in 12 Henry VIII.;¹ and there it does not appear whether the executors demurred or not; and if they pleaded in bar, it was no more against the present case than the precedents before mentioned. But admitting judgment to have been given on demurrer, they then alleged the opinion of Fitzherbert, in 27 Henry VIII., who, as we have before seen, pronounced it not to be law.

To this it was answered, that in this action of trespass upon the case, the testator could not have waged his law; and they contended it to be a rule of law, that where the testator would not be allowed this privilege, the action would lie against the executors. They said it was not reasonable, if they had assets to pay debts and legacies, and also to pay the plaintiff, that they should retain the rest of the goods to their own use, being only put in trust for the benefit of the testator's estate: that the judgment in 12 Henry VIII., being given by the court, was not so easily to be rejected on the mere *dictum* of Fitzherbert. They admitted there might be some weight in the objection to the declaration not averring that there were assets after paying the *legacies*; and they thought the justices had better give judgment upon this than on the principal matter. Upon searching the record of the case in 12 Henry VIII., it appeared that the averment of assets did not extend to *legacies*, as the report says, but only to debts, and to satisfy the plaintiff also; which exactly corresponded with the present declaration.

These were the arguments on both sides; and the justices were so easily satisfied on the subject, that they gave

¹ *Vide ante.*

judgment for the plaintiff, as Plowden says, without any *solemn* argument. We are informed from the same authority that many learned persons had entertained doubts upon the decision in 12 Henry VIII., not thinking that case to be well adjudged; and that such action was not maintainable by the ancient law, but *that conscience had eneroached the case upon the common law*. He himself, however, was of another opinion; and he even judged the action to be good, without surmising that the executors had assets to pay debts, and satisfy the plaintiffs also:¹ so far was he from agreeing with those who would have had the averment to include *legacies*.

The provisions of this act do not come into such common use as those of the following:—The stat. 1 and 2 Philip and Mary, c. 12, has made some regulations on a subject which had not been touched by the parliament since the reign of Edward I.² It is hereby enacted, that no distress shall be driven out of the hundred where it is taken, except to a pound overt, within the county, not above three miles distant from the place where it was taken: and no cattle or goods taken by distress at one time are to be impounded in several places, whereby the owner shall be constrained to sue several replevins, under pain of an hundred shillings, and treble damages to the party grieved (*a*). Only fourpence is to be taken for poundage of one distress, under the penalty of £5 (*b*). For the more speedy

(*a*) It was held in the reign of Elizabeth, that a man could not take two distresses for the same rent if there be sufficient at first. The case as stated was: If one taketh *trop petit distress* for rent, and after taketh another distress for the same rent, this is not good; for it was his folly that he took not a better distress at first, which implies that he could have done so, and that there was a sufficient distress. It is added, however, by the reporter: "But, in the 'Abridgment of the Assizes,' it is said that if there be not sufficient distress when he distrained he may distrain again" (*Vide* 1 *Vent.*, 104; 1 *Morr.*, 71; 1 *Lord Raym.*, 205). By 17 Charles II., c. vii., where cattle are distrained, and there are not sufficient to satisfy the arrears, the party may distrain from time to time. (See also 2 *W. & M. Reps.*, 2, c. 5; 3 *Com. Dig.*, 115; 2 *Bac. Abr.*, 115; 3 *Bl. Comm.*, 12; 1 *Burr.*, 580.)

(*b*) This statute is still in force and in use. Thus, within the last few years, there has been a case in which there was a declaration on s. 2 of stat. 1 and 2 Philip and Mary, c. xii., stating that one W. M. C. distrained a horse of plaintiff damage feasant, and impounded the same in a public pound at S., in the county of Surrey, of which defendant was keeper, and defendant impounded the said horse for one whole distress; and defendant, so being such keeper, demanded, and then took from plaintiff for keeping in pound said distress, to wit, the sum of 3s., being more than the sum of 4d. for one

¹ Plowd., 180.

² *Vide* vol. ii.

delivery of cattle taken by distress, every sheriff, at his first county-day, or within two months next after he has received his patent of office, is to appoint, and proclaim in the shire-town, four deputies at the least, dwelling not above twelve miles from each other, who are to have authority in his name, to make replevies, and deliverances of distresses, under the penalty of £5 for every month that he neglects to make such appointment (a).

The stat. 2 and 3 Philip and Mary, c. 7, made some regulations respecting the sale of horses in fairs and markets, which were designed to prevent the disposal of stolen horses, and thereby put a check upon that offence. The complaint was, that such horses used to be sold in houses, stables, or some by-place, and the toll taken in private; "whereby the true owners," says the act, "were not able to try the falsehood and covin between the buyer and seller," and so were without remedy. It therefore enacts, that the owner or chief-keeper of every fair and market-overt shall appoint a certain open place, within the town, where horses used to be sold at the time of the fair or market; in which place there shall be appointed a sufficient person to take toll from ten o'clock

whole distress, "whereby, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff, being the party grieved, to demand and have from the defendant the sum of £5," etc.:—Held, on motion in arrest of judgment, first, that the declaration was bad for want of an allegation, that the act done by the defendant was "against the form of the statute;" held, secondly, that an action by the party grieved, on s. 2 of stat. 1 and 2 Philip and Mary, c. xii., was not within stat. 31 Elizabeth, c. v., or s. 2 of stat. 21 James I., c. iv., and therefore the venue might be laid in any county (*Fife v. Bousfield*, 13 *Law, J., N. S., Q. B.*, 306; 8 *Jur.*, 734).

(a) There is no subject which has given rise to more legislation than that of distress. The above was for protection of the tenants; but more modern legislation has been required in favor of the landlords. Thus in the Landlords' Act, 11 George II., c. xix., s. 23, there is the following enactment to protect landlords against vexatious replevins:—"23. And to prevent vexatious replevin of distresses taken for rent, Be it enacted by the authority aforesaid, that from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-eight, all sheriffs and other officers having authority to grant replevins may and shall, in every replevin of a distress for rent, take, in their own names, from the plaintiffs and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more of the credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer), and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return should be awarded before any deliverance be made of the distress."

in the morning to sunset, under pain of forty shillings. This toll-gatherer is to take such tolls as are due for horses at that place, between those hours *and at no other time or place*; and is to have before him, at the time, the parties to the bargain, with the horse so sold; and shall write in a book, kept for that purpose, the names and place of abode of the parties, and the color, *with one special mark* at the least, of the horse. This book is to be brought, the next day after the fair or market, to the owner or chief-keeper thereof, who shall cause a note to be made of the number of horses sold, and subscribe his name, or set his mark to it.

It is, moreover, declared that the sale in a fair or market-overt of any horse that is thievishly stolen or feloniously taken shall not alter the property, unless it be, during the time of the fair or market, openly ridden, walked, or kept standing for an hour at least, between ten o'clock in the morning and sunset, in the open place where horses are commonly used to be sold, and the contract be made in the above manner; and the owner may seize such horse, or bring an action of detinue or replevin for it. The justices in their sessions may inquire of all offences against this act. Some further provisions of the like kind were afterwards made in the reign of Queen Elizabeth.¹

By stat. 2 and 3 Philip and Mary, c. 5, the two previous statutes, 22 Henry VIII., c. 12, and 3 and 4 Edward VI., c. 16, were confirmed and declared to be in full force; after which this act goes on to enact the same provisions as had been made by stat. 5 and 6 Edward VI., about appointing collectors, with their gathering, distribution, and accounts. To this it was now added that if a parish was too small to support its own poor, then, upon certificate to the justices of the county, two of them, upon examination of the matter, might grant a license under seal to such of the poor as they thought proper to beg abroad. In towns, the chief officer was to exhort a wealthy parish to assist a poorer. If persons so licensed to beg exceeded the limit prescribed to them, they were to be punished as vagabonds according to the stat. 22 Henry VIII. Such licensed vagabonds were to have a badge on the breast and back of the outer garment. This act was only temporary, and at the

¹ Stat. 31 Eliz., c. 12.

end of the first session of the next parliament it expired. So that the regulation of the poor at the close of the reign stood upon stat. 22 Henry VIII., c. 12, and 3 and 4 Edward VI., c. 16, and 5 and 6 Edward VI., c. 2; and these were afterwards superseded by other regulations in the reign of Elizabeth.

With so many precedents of extraordinary prerogatives before her,¹ it cannot be wondered at that Mary, King and gov-
ernment. who had in contemplation to abolish the late innovations, should make use of such ready instruments to effectuate it. Governed as she was by a natural sourness of temper, heightened by her bigotry to the Catholic religion, it is not surprising that such designs were followed with many oppressive acts of arbitrary authority.

To supply the scantiness of her parliamentary grants, Mary revived the irregular method of raising money by loans, which there had been no need of attempting during the reign of Edward. She levied at one time in this way £60,000 upon a thousand persons who she thought would most readily comply. At another time she levied the same sum on seven thousand yeomen, and £50,000 on the merchants. She published a proclamation prohibiting, for a certain time, the exportation of cloths, intending by this practice to induce such to comply whose interest would be thereby affected in the foreign markets. She used to levy subsidies granted in parliament before the stated time. She issued privy seals for the same purpose of raising money, and seized corn to victual her ships without paying for it.

Proclamations of an arbitrary import were often issued. One of these was to enjoin those whose incomes had been affected by the loans, and who on that account had discharged some of their servants, to take them back into their service, because they had become vagrants and thieves. Others were issued against books of sedition, treason, and heresy. Those who had any of these books, and did not presently burn them, without reading or showing them to any person, it was declared by proclamation should be esteemed *rebels*, and without any further delay should be executed by martial law.²

As an auxiliary to the bishops' court, a special commis-

¹ Hume, vol. iv., p. 423.

² Ibid., 419.

sion was appointed by the queen's prerogative, with extraordinary powers. It consisted of twenty-
one persons, and any three had the au-
thority of them all. The commission says, "That since
many false rumors were published among the subjects,
and many heretical opinions were also spread among
them; therefore the commissioners, or any three of them,
were to make inquiry, either by presentment, by witnesses,
or any other *politic* way they could devise, and to search
after all heretics, the bringers in, the sellers, or readers
of all heretical books. They were to examine and punish
all misbehavior or negligences in any church or chapel;
and to try all priests that did not hear mass, or come to
their parish church to service, that would not go in
procession, or did not take holy bread or holy water;
and if they found any that obstinately persisted in such
heresies, they were to put them into the hands of the
ordinaries, to be proceeded against according to law; giving
them full power to proceed as their discretions and
consciences should direct them, and to use all such means
as they could invent for the searching of the premises;
empowering them also to call before them such witnesses
as they pleased, and to force them to make oath of such
things as might discover what they sought after."¹

New commissions.

Instructions were also given to justices of the peace,
"That they should call secretly before them one or two
honest persons within their limits, or more, at their
discretion, and command them, by oath or otherwise, that
they shall secretly learn and search out such persons as
shall evil-behave themselves in church, or shall despise
openly by words the king's or queen's proceedings, or go
about to make any commotion, or tell any seditious tales
or news; and also that the said persons, so to be appointed,
shall declare to the same justices of the peace the ill-
behavior of lewd, disorderly persons, whether it shall be
for using unlawful games, or such other light behavior of
such suspected persons; and that the said information
shall be given secretly to the justices, and the same
justices shall call such accused persons before them, and
examine them, without declaring by whom they were
accused. And that the same justices shall, upon their

¹ Burn. Ref., vol. ii., 323.

examination, punish the offenders according as their offences shall appear upon the accusation and examination, by their discretion, either by open punishment or by good abearing."¹ Thus were justices directed to stretch the limits of their jurisdiction, in order to punish facts which were no crimes, after a trial authorized by no law.

To carry the execution of these designs still further, letters were written to the Lord North and others, to put such obstinate persons as would not confess to the *torture*, and there to order them *at their discretion*; and a letter was written to the lieutenant of the Tower to the same effect. Whether this pretended obstinacy was a concealing of heretics, or of the reporters of false news, does not appear. Whatever the pretence was, the putting people to the *torture* because they were thought obstinate and would not confess, and the leaving the degree of it to the discretion of those appointed for their examination, were great steps towards the most rigorous part of the proceedings of the Inquisition.²

While informers and spies were encouraged, the prisons were filled with persons of all descriptions who had incurred the displeasure of the court. When some of Mary's oppressions in raising men and money had created an uneasiness and clamor in the nation, she endeavored to prevent such ill-humors from getting to any height by throwing into the Tower some of the most considerable gentry. That such prisoners might not be known, they were, some of them, carried thither in the night-time; others were hoodwinked and muffled by the guards who conducted them.³ To prevent any one from daring to reflect on such proceedings, she struck a terror into the House of Commons, always obedient enough to the court, by imprisoning their members for freedom of speech; and when some had seceded from parliament, she directed them to be indicted for it in the King's Bench.⁴

On the trial of Sir N. Throckmorton, the counsel for the crown proceeded in reading confessions of absent persons, and putting the prisoner to answer to them severally as they were read. This kept him constantly engaged through the whole trial in a sort of altercation with the crown lawyers, whose deportment, it should seem, very

¹ Burn. Ref., vol. iii., 247.

² Ibid., 243.

³ Hume, vol. iv., 432.

⁴ Ibid., 403.

ill corresponded with the decorum to be observed on such occasions. Only one of the deponents was produced, and that was to swear him to the truth of his depositions. The prisoner did not object to this mode of proof any otherwise than that, since stat. 5 and 6 Edward VI. there should be two witnesses to prove a treason; which remonstrance, for reasons which have been considered, was, on this and on all other occasions, disregarded. The only witness produced to give evidence *vivâ voce* was called by Throckmorton himself, and was rejected by the court.

The prisoner, who was very able to cope with the lawyers on the part of the prosecution, prayed that he might have the use of a statute-book, which was denied him, notwithstanding he pressed on them the plain injunction of the queen, lately delivered to her judges, to administer justice indifferently.

The harshness he experienced, both from the bench and the counsel, had not the intended effect, but, on the contrary, perhaps prejudiced the jury in favor of an oppressed man: they acquitted him of the indictment. But the virulence of the prosecution did not end here, for other circumstances that deserve to be remembered attended this transaction. The attorney-general, after the acquittal, prayed the court that the jury might be bound in recognizances to answer for their verdict. They were soon after fined and imprisoned by a sentence in the Star Chamber; they were to pay one hundred marks apiece, and to be imprisoned till further orders. It was some months before they were released, and then not without paying different compositions, according to the value of their effects, which had, in the meantime, all been inventoried and appraised by the sheriff for the purpose.¹

Such was the security which might be reposed in this boasted privilege of trial by a jury of equals, and such the perils under which a jury exercised their own judgment in opposition to the inclinations of the sovereign. During the reign of the Star Chamber, the persons of jurors were no more exempted from animadversion than those of common individuals; everything was reduced to the same level of subordination.

In the reign of Queen Mary the attainder of the Duke

¹ State Trials, vol. i., p. 78.

of Norfolk, which had passed in the latter end of Henry VIII.'s reign, was represented as null and void, as well on account of other informalities, as because no special matter was alleged against him, except the wearing of a coat of arms which his ancestors had many years before him worn without offence.

However sanguinary this reign was in criminal proceedings for heresy, the court never received any assistance in its schemes of resentment from the parliament, which had passed no bills of this kind, except the following might be considered in that light:

The statute of Edward VI., which took away clergy from the principals in murder, had left accessaries to enjoy the capacity they derived at common law from the benefit of clergy. It happened in 3 and 4 Philip and Mary, that one Smith had hired two persons to murder one Rufford. The wife of Rufford petitioned the House of Commons that Smith might, by act of parliament, be deprived of his clergy. Upon this the Commons sent to the queen, praying that she would order Smith to be brought from the Tower to the bar of the house. He was accordingly brought, when the other parties confessing the whole matter, and Smith at length doing the same, the bill was passed. But when it was sent up to the Lords, it was there strongly opposed, particularly by the clergy, who would not readily consent to any diminution of their ancient privileges; however, at last, it got through that house, and received the royal assent. The next year we have seen there was a general law made, taking clergy away from accessaries before the fact in murder and other crimes.

There had been before in this reign an instance of an *ex post facto* law. It being suggested to the parliament that the congregations in the city had prayed God to convert or confound the queen, it was thereupon enacted that whosoever had so prayed, or should so pray in future, should be taken for a traitor.

The principal oppressions in the above reign, whether by summary and illegal trials, by imprisonment, confiscation, execution, or otherwise, were occasioned by the alterations in religion, and these were carried to extraordinary, though not equal, lengths, both by Protestants

and Catholics, as each party had in turn the aid of the executive power.

The executions for what was called heresy in Queen Mary's reign (*a*) were so numerous as to render the short

(*a*) With reference to this unhappy persecution, it appears important to observe that it was not the will of the church, but of the state; that it was the result, not of the religious bigotry of ecclesiastics, but of state policy, and, there is reason to believe, not a little of the worst and vilest state craft. It did not commence until after the marriage with the Spanish king, nor until after the lapse of two years after the restoration of the ancient religion, and then it was not only not instigated, but it was rather discouraged, by the prelates; and though it was no doubt authorized by the sovereign, it was at the advice of her council, composed chiefly of laymen. The cardinal legate opposed it, the king's confessor preached against it, the prelates acted only upon compulsion; and there is reason to believe, from the terms of the queen's reply to the representation of the council, that she rather yielded to their opinion, and desired the execution of the measure not only to be moderated, but to be directed rather against popular agitators than mere private holders of heretical opinions. "Touching the punishment of heretics, we think that it ought to be done without rashness, and not leaving, in the meantime, to do justice to such as by learning would seem to deceive the people, and the rest so to be used that the people might well perceive them not to be condemned without just occasion" (*Collier's Eccl. Hist.*, ii., 371) — that is, as it should seem, not without just provocation, for, of course, in no case would the person be condemned unless convicted of heresy. But the object appears to have been to put a stop to a violent system of agitation against the restoration of the old religion, and this view is supported by the undoubted fact, that after the first few executions, the church, in the person of a friar-preacher, under the sanction of the cardinal legate, made such a vigorous protest against the continuance of the executions, that they were stopped, and not renewed again until after an interval of some weeks, and then only upon direct orders from the council, and in consequence of the provocations offered by the excesses of some of the sectaries (examples of which are given in *Strype*, 210–212), and the detection of a new conspiracy. Under stringent orders of the council the penal proceedings were then renewed, chiefly against the preachers and agitators against the restored religion; but even then the reluctance of the bishops was so great, that it was remarked by the Lord Treasurer, the Marquis of Winchester, one of those servile ministers who were ever ready to carry out the royal will, and had been in office under Henry and Edward, and was in favor under Elizabeth, and he complained to the council, who sent a reprimand to the bishops, and required them to proceed according to law (*Strype*, iii., 217; *Burnet*, ii., s. 285; *Fox*, iii., 208). Even the notorious Bonner had to be urged on by these remonstrances, and did not proceed, except against persons sent to him by the council, or by commissioners appointed by the council (*Fox*, iii., 208–423; *Strype*, iii., 239); and as the law then stood, he absolutely had no legal alternative but to proceed. Nothing can be more clear than that these proceedings were the results of lay power, not ecclesiastical. Nothing can be plainer than that it was not the bishops who urged on the council, but that it was the council who urged on the bishops. And there is reason to believe that it was the council who urged on the queen; a lay council, a council composed chiefly of laymen, of whom several had conformed to Protestantism under Edward, and all of whom had acquiesced in the destruction of the papal supremacy and the confiscation of religious houses, and held church

time in which this persecution raged one of the bloodiest in the history of the church. The cruelties exercised on

lands themselves. Nothing can be more clear than that it was not only the secular power which gave the authority to punish for heresy, but that it was the same power which compelled the exercise of the authority. The proceedings against heretics were always taken in consequence of letters from the council, in which only one prelate sat, so that it was a council composed almost entirely of laymen; and there is strong reason to believe that the queen herself yielded to the representations of the council. At all events, the authority under which the proceedings for heresy were taken was entirely a lay authority, and the exercise of it was also entirely enforced by lay authority, and by the authority of a council composed for the most part of men who, as they changed their religion with the accession of every sovereign, could not have been influenced by any motives of religious bigotry, so that the cause must either be sought in provocation and revenge for the outrages of the reformers, or in some deep and crafty scheme of policy, which may perhaps be surmised from this significant fact, that most of the members of the council were holders of church property, and that notwithstanding the papal bull giving the legate authority to allow of its alienation, there were still various causes of uneasiness. The pope had first published a bull, condemning and revoking, in general terms, the alienation of church property to secular uses (*Burnet*, vol. iii., s. 3); and though, to prevent doubts on the subject, the legate procured from him a bull expressly excepting the church property in England from the operation of the former bull, and confirming his doings respecting the assurances of abbey lands, and this was read to both houses (*Journal of Commons*, 42 *Lingard*, vol. v., c. 5); yet these repeated declarations on the subject were calculated to keep men's minds in uneasiness, and to this was added the fact that the queen evinced her sense of the inalienable sanctity of church property by insisting upon making restitution of all the church property still in the hands of the crown. This question of church property was probably the key to much that followed. The fact that the queen should feel it her duty, in spite of opposition in parliament, to resign all the church property the crown still retained, was strongly significant of her convictions on the subject, and tended to confirm an impression which prevailed that she intended to use all her influence to obtain an act to compel restitution of all church property, especially as the sanction of a legal title, or the removal of ecclesiastical censures, were not sufficient to satisfy conscientious scruples, such as many retained. On the whole, therefore, it was inevitable that considerable uneasiness should exist upon the subject among the holders of church property, a powerful and influential class. And they would be naturally disposed (with that spirit of crafty policy which was characteristic of statesmen in that age) to take any measures which should cover the old religion with odium, defeat the measures for its restoration, and thus relieve them of their doubts as to restitution. The members of the council were of this class, and the order to take penal proceedings against heretics emanated from the council. The natural effect of the executions would be to render the old religion odious, for which very reason it was opposed by the papal legate; and this could hardly have been overlooked by the able and discerning men who composed the council. As a matter of fact, it was the council who pressed these odious measures; and the men who composed the council were holders of church property, and in the reign of Elizabeth most of them professed Protestantism. The privy council wrote circular letters to the nobility and gentry desiring their attendance at the burnings, with that of all those whom they could influence (*Book of P. C.*, in *Burnet*, vol. ii., A.D. 1555, quoted in *Mack. Hist.*

the living have filled volumes with melancholy relations; but the prosecution of the dead, which was instituted by

Eng., vol. ii., p. 326, in note), while, on the other hand, the historian says that the cardinal legate discouraged persecution in private, while his chaplain preached openly against it (*Ibid.*): and that of fourteen bishoprics, the Catholic prelates used their influence so successfully as altogether to prevent bloodshed in nine, and to reduce it within limits in the remaining five (*Ibid.*). He adds, "Justice to Gardiner requires it to be mentioned that his diocese was of the bloodless class" (*Ibid.*), although the popular idea is, that he was the main promoter. As regards the nature of the proceedings, and the character of the victims, it is difficult to collect accurate accounts, from the obvious cause that the popular accounts, current through the whole of the next reign, would be derived from prejudiced sources, and would be influenced by partisans, or dictated by politicians, to serve the purpose of the times. As to "Fox's Martyrology," Sir J. Mackintosh is moderate in observing that the stories of that zealous but credulous writer are to be indiscriminately believed (*Ibid.*, 329). It was disclosed in the next reign that he was so reckless as actually to record circumstantially the death of persons who lived until long afterwards (*vide post*, c. xxxiv.). But when Sir J. Mackintosh proceeds to quote Lord Burleigh, who, as he truly says, if he be wrong, has not the same excuse as Fox (that is, not the excuse of honest credulity), he surely had forgotten the utterly crafty and unscrupulous character of that statesman's policy, the cruel persecutions he kept up against Roman Catholics during the long reign of Elizabeth, and the obvious disposition to excuse his own policy by exaggerating the persecutions of the previous reign. His treatise, "The Execution of Justice in England," cannot but be regarded as far less reliable even than that of Fox, and its exaggerations go beyond Speed; and are too gross even for Burnet. Speed gives two hundred and seventy-six as the total number of victims, which, divided among five dioceses (for in nine there were none), would be fifty-five in each diocese; and thus, as each diocese would contain several counties, would probably be from fifteen to twenty in each county; so that in point of number or extent, the truth, according to Speed, comes to this, that in only five dioceses out of fourteen there were any persecutions at all; and that in these, in the course of one or two years, about fifteen or twenty in each county — that is, at the rate in each county of eight or ten in a year — were unhappily put to death; and this at the repeated orders of the council, and for the most part against the will of the prelates, but for whose reluctance the number of victims must have been far greater. So much for the number of the victims. But as to the real character and true causes of the proceedings, there is still greater difficulty in getting at the truth, and though no doubt, in some instances, the parties may have suffered on account of heresy, it is manifest that many of them provoked their fate by their treasonable conduct, or by their own former persecutions against Catholics, or by their violent, seditious disturbance of the restored religion. It is notorious that some of the most eminent of the victims illustrated the former of these causes; and Strype gives many instances of the latter, that is, of persons who provoked the proceedings against them for heresy, by their violent disturbance of the exercise of the restored religion. Lord Macaulay remarked upon the subject, that if any one could deserve burning for heresy it would be those who had inflicted that fate upon others, and it is a simple fact that this was so of some of the first and most eminent victims of the Marian persecutions. Moreover, at the end of the last reign, the Protestant prelates, including some of these very victims, had drawn up a reformation of the law as to religion, which inflicted the punishment of death on those who held Roman Catholic doctrines.

the visitors of the University of Oxford, is a singular piece of legal process. Bucer and Fagius, two foreign

Since Sir J. Mackintosh wrote, however, Dr. Maitland, chaplain to the late Dr. Howley, Archbishop of Canterbury, has published a "History of the Reformation," in which the true nature of these unhappy proceedings is disclosed with still greater candor. Dr. Maitland—one of those eminent and learned men of whom the Church of England in these times may well be proud, and who deem her foundations to rest too securely upon the intelligence of an enlightened age to require to be propped up by vulgar prejudices and coarse misrepresentations—devoted himself specially to this subject, consulted the original records in the archives of the sees of London and Canterbury, and elicited a vast amount of information, which places these unhappy proceedings in a light, which, though no doubt still sufficiently painful, yet is vastly different from the natural inflamed representations given by the friends of the victims, the heated exaggerations of polemical partisans, or the cool inventions of unscrupulous politicians. From the authentic records disclosed by this learned ecclesiastic, it abundantly appears that many, if not most, of the unhappy victims of these dreadful proceedings had provoked their fate, not only by offensive and obtrusive expression of their opinions, but by positive outrages upon the exercise of the restored religion; in some instances, outrages which Roman Catholics would consider sacrilegious, and in some such as would be severely punishable by the criminal law, and in not a few instances might easily have justified the infliction of capital penalty, for priests were stabbed even at the altar. It is a simple fact that men who were utterly indifferent to religion were members of the council, who issued these decrees for the burning of Protestants. Thus the infamous and servile Rich, who, under Henry, had entrapped the noble-minded More into the admissions which were made the pretext for his murder, and who, during the reign of the Protestant Edward, held the great seal, sat in the council under Mary, and his name was often placed at the head of the commissions in his county for trying heretics, at the execution of some of whom he was directed to be present (*Archæologia*, xviii., 181). And then this very same man was in the council under Elizabeth. Nor was this a solitary instance. Many others could be adduced. Thus there was the case of Cholmly, chief-baron under Henry and under Edward, a member of the council under Mary, and appointed upon several occasions to examine prisoners in the Tower, with the discretionary power of administering torture (*Jardine on Torture*, 75), and finally he was in favor under Elizabeth. The secret is, that the books of the augmentation office show that he had a considerable share in the lands distributed on the spoliation of the monasteries (*Hasted's Kent*, i., 450; 9 *Rep. Pub. Rec. App.*, 190). So in other cases, which it would take too much space to enumerate. The truth is that, except perhaps the queen herself, there was not any one who took part in those proceedings from any other motives than policy, and she, it is plain, favored them more from her hereditary love of arbitrary power, than from religious bigotry, for as regards her own prerogative she showed the true Tudor character, and was as absolute as her tyrannical father. A few illustrations connected with legal history may be of interest. Bromley, chief-justice under Mary, and a member of her council, had been one of the council of regency appointed under Edward, and had been in office a professed Protestant all through that reign. He succeeded Cholmly, who had a considerable share in the church lands, and was active in the persecutions. Even where the persecutions were actually perpetrated by honest zealots, it was only under the authority of a council, composed of men who were actuated, not by bigotry, but policy. Thus, for instance, when Anthony Brown, afterwards chief-

reformers, there buried, were cited, in the true spirit of the canon law, to appear and defend themselves; and after three citations, the dead bodies not rising to speak for themselves, and none coming to plead for them, for fear, as Bishop Burnet observes, of being sent after them, the visitors proceeded *ex parte*. They examined witnesses concerning the heresies they had taught, and adjudged them obstinate heretics, ordered their bodies to be taken out of their graves, and to be delivered over to the secular arm. A writ was issued out of Chancery for the execution of this sentence, their bodies were taken up, and, being carried in coffins, were tied to the stakes, with many of their books and heretical writings, and all burnt together.¹

The decisions of courts in the reigns of Edward VI. and Queen Mary, are to be found in Dyer, who reports all through these two reigns; as also do Benloe and Dalison. Some few cases are to be found in the collectors Jenkins

justice, acted in his county, it was under letters from the council; and he and other magistrates, acting under such orders, sent up prisoners to be tried before the bishops' court, which could only determine the question of heresy, the punishment inflicted being a matter of secular law, and hence it was not the bishops who were the real authors or actors in these proceedings (*Maitland's Hist. Ref.*, 427). It will be observed that, without these commissions, the bishops could not have inflicted corporal punishments, and they were issued by a council composed chiefly of laymen. It may be added that the commissions were illegal, and could only have been issued by servile ministers, such as Rich, etc., who, no doubt, acted from some worse and more sinister motive than religious bigotry. It was thus of the infamous Rich, who was the main instrument in procuring the judicial murder of More and Fisher; after making himself thus subservient to the vengeance of the tyrant upon the adherents of the papacy, we find him a member of the council under Edward VI.; and afterwards, in the reign of Mary, he was frequently placed at the head of commissions for trying heretics, at the execution of whom he was sometimes directed to be present (*Archæologia*, xviii., 181). So of many others. These men, it is manifest, did not act from bigotry, but policy. The learned writer already quoted shows, by specific instances, that the victims for the stake were hunted out by servile lawyers or interested laymen at the instigation of letters from the council (*Maitland's Hist. of the Reformation*, 427, 468, 514). It is due to historic truth, therefore, to represent those abominable deeds as the result, not so much of honest religious bigotry, as of some foul and crafty policy. No doubt some honest bigots concurred in it, but it was invented and urged on by viler creatures. It is related of Mary that a plan was once submitted to her to render her independent of parliament. She sent for Gardiner, and bade him give her his secret opinion upon it. He said, "It is a pity that so virtuous a lady should be surrounded with such sycophants. It is full of things too bad to be thought of." She thanked him, and threw it into the fire (*Burnet*, ii., 278).

¹ Burn. Ref., vol. ii., 321.

and Keilway, some in Moore, and a few, but those very important, in Plowden. There are some cases of these two reigns in Leonard, and some, towards the latter end of Philip and Mary, in Owen.

Staunforde's "Pleas of the Crown" was the first work which treated the subject of criminal law professedly, and in detail. This book is written in French: the method of it is perspicuous, and the matter disposed with learning and accuracy. The author is uncommonly full in his quotations; the statutes are generally given at length; and whole pages are frequently transcribed from Bracton. Notwithstanding the alterations we have seen the criminal law undergo since the reign of Henry III., yet Staunforde has ventured perpetually to recur to this ancient writer as an authority, and has condescended to take from him many complete chapters. This is in general done with success and propriety; though sometimes his author has failed him; as, among other instances, may be observed of Bracton's definition of larceny, which, as we before observed, was not law at the time Staunforde wrote.¹

In the account which this writer gives of crimes, his method is to begin by stating what they were in Bracton's time, and then to add the subsequent decisions which had affected the old law; at other times he entirely relies on his favorite author. This is done in a compendious way, without enlarging much on any parts of the subject. On the whole, he seems to aim at nothing more than digesting in a clear manner what could be collected from others.

As Staunforde has the praise of being our earliest writer on pleas of the crown; so has his merit been acknowledged by those who have followed him in the same walk; they having, in general, adhered to the arrangement and divisions of his work. He divides his subject as falling under three considerations: first, of crimes; next, of the method of bringing delinquents to justice; and lastly, of trials and punishment. The several titles into which these are subdivided, have furnished the heads of every book which has been written since his time on the same subject. This treatise is not voluminous; and when the quotations out of Bracton, and the statutes, are taken from it, the book is diminished more than half.

¹ *Vide ante.*

We cannot but feel a secret pleasure when we find an author, to whom we have before been under such obligations, in repute with a judge of eminence and learning upon points of modern practice. After the lapse of three centuries, it was hardly to be expected that we should be called upon to renew our acquaintance with Bracton; and Staunforde is entitled to our acknowledgment for the strong testimony he has given in later times to the intrinsic merit of this father of the English law. Bracton seems to have been a great authority with Staunforde; for it appears from the reports, that he ventured to cite and argue from him upon the bench, at a time when it was the fashion to consider Bracton and Glanville not as authors in our law, but to be quoted, if at all, only for ornament in discourse;¹ and for consonancy and order, where they agreed with better authorities.²

The press was not idle during these two reigns, but produced several works of use to the practising lawyer. William Rastell published, in 1559, a Printing of
law-books. collection, in English, of the statutes now in force, from Magna Charta to the 4th and 5th of Philip and Mary.³ In 1553, there came out an abridgment of the Book of Assizes.⁴

Thomas Berthelet, who had a patent of the office of king's printer for life, died in 1555. After this, in 7 Edward VI. there is found a special license to Richard Tathile or Tottel (whose name, like many others of this time was variously spelled), for him and his assigns to print for seven years all manner of books of the temporal law, called the common law, so as the copies were allowed and judged proper to be printed by one of the justices, or two serjeants, or three apprentices of the law, one of whom was to be a reader in court; and no one was to print what he had first printed, under pain of forfeiture of such books.

¹ Plowd., 357, 358.

² Such is the manner in which Saunders and Catline deliver themselves, in the argument of *Stowell v. Lord Zouch*, in the 11th of Elizabeth. Such a judgment upon these ancient writers might be very discreet and just at the time; but I was astonished to find Fitzherbert inform us, that it was agreed by the whole court in 35 Hen. VI. that Bracton was *never* taken for an author in our law. It was a pleasure to discover that the Year-Book had given him no warrant for this monstrous opinion. The readers of Abridgments have been long aspersing the reputation of Bracton with more success than authority.

³ Typ. Antiq., 474.

⁴ Ibid., 810.

A license for the same term was also granted him in 2 and 3 Philip and Mary; and in 1 Elizabeth he had a similar license for his life.¹ By Tottel, and by other printers, in these two reigns, most of the books printed in the reign of Henry VIII. were reprinted; but such different editions would be too tedious to enumerate. The editions, however, of such books as had never before reached the press, are worthy of notice. Among such are the following: In 1555, was printed by Tottel a book entitled "Anni Regis Henrici septimi;" containing some Year-Books of that king; respecting which he informs us, that the 1st and 2d were from a new collation; and that the 10th, 11th, 13th, 16th, and 20th, had never before been published.² Some time about 1553, was printed a tract of Sir John Fortescue with the following title, "De Politicâ Administratione et Legibus civilibus florentissimi Regni Angliæ Commentarius."³

In this age of reformation, an act was passed through the House of Commons in 1549, for making some considerable alterations in the process of the common law; but it was thrown out in the House of Lords. A long discourse on this topic of reforming the common law was written about this time, which Bishop Burnet says he had seen. It is there complained that the law of England was a barbarous kind of study, *and did not lead men into a finer sort of learning*; which made common lawyers so unfit for negotiating foreign affairs. It was therefore proposed by this author that the common and statute law should be digested into a body under titles and heads, and put into good Latin, in imitation of the Roman laws;⁴ a proposal which, it should seem, was less necessary now than it ever had been, as Fitzherbert's and Rastell's works were new, and had at least made a great step towards a complete digest. The whim of imitating the Roman law so closely as to adopt its language, was taken up and executed by a writer in after-times;⁵ the success of which performance is a more decisive answer to the above project than many arguments of expedience and propriety.

An order was made in the society of the Inner Temple,

¹ Orig. Jurid., 59, 60. Typ. Antiq., 806. ³ Ibid., 549.

² Typ. Antiq., 809.

⁴ Burn. Ref., vol. ii., 91, 92.

⁵ Dr. Cowell's *Institutiones Juris Anglicani*, published in the reign of James I.

in 3 and 4 Philip and Mary, that thenceforth no attorney, or common solicitor, should be admitted into that house without the assent and agreement of their parliament.¹

The grievance of long beards was not yet removed. We find an order was made in the Inner Temple, that no fellow of that house should wear his beard above three weeks' growth, upon pain of forfeiting twenty shillings.² In the Middle Temple, an order was made in 4 and 5 Philip and Mary that none of that society should wear great breeches in their hose, made after the Dutch, Spanish, or Almain fashion, or lawn upon their caps, or cut doublets, on pain of forfeiting 3s. 4d.; for the second offence, the offender was to be expelled.

In 3 and 4 Philip and Mary, an order was made by the society of Lincoln's Inn, that thenceforth none should be admitted into that house who had not been of an inn of Chancery before the space of one year, unless he paid forty shillings at admittance.³ In 1 and 2 Philip and Mary, a gentleman of Lincoln's Inn was fined five groats by a special order, for going in his study-gown in Cheapside on a Sunday about ten o'clock in the forenoon, and in Westminster Hall, in the term-time, in the forenoon.⁴

In 3 and 4 Philip and Mary, the following orders were agreed upon to be observed in all the four inns of court: That none of the companions, except knights or benchers, should wear in their doublets or hose, any light colors, except scarlet and crimson; nor wear any upper velvet cap, or any scarf, or wings in their gowns, white jerkins, buskins, or velvet shoes, double cuffs on their shirts, feathers or ribbons on their caps, on pain of forfeiting 3s. 4d., and for the second offence, of expulsion. No attorney was to be admitted into any of the houses: and in all admissions thenceforward this condition was to be implied: that if he who was admitted practised *attorneyship*, he should be *ipso facto* dismissed, and have liberty to repair to the inn of Chancery from whence he came, or to any one of them, if he were of none before. It was required that none of the companies of such houses should wear their study-gowns into the city any further than Fleet Bridge or Holborn Bridge; nor might they wear them as far as the Savoy, upon like pains as those before mentioned. None of the said

¹ Dugd. Orig., 147.

² Ibid., 148.

³ Ibid., 242.

⁴ Ibid., 243.

companions, when in commons, might wear Spanish cloaks, sword and buckler, or rapier, or gowns and hats, or gowns girded with a dagger on the back, upon the like pain.

The moot-cases in any of the houses of court were not to contain more than two points for argument: they were to be brought in pleading, and the puisne of the bench was to recite the whole pleading. None of the bench were to argue above two points; if any did, the reader was to remonstrate with him, and correct it in future. Every reader of a court of Chancery was to give the same orders about apparel, weapons, and study-gowns, to his house of Chancery. Among the same regulations it was ordained, that none of the said companions under the degree of a knight, being in commons, should wear any beard above three weeks' growth, on pain of forfeiting forty shillings, and double the sum every week after monition (a).¹

(a) The reader is again directed to that interesting and valuable work, "The Lives of the Judges," by Mr. Foss, for much information upon all these subjects.

¹ Dugd. Orig., 310.

CHAPTER XXXIII.

ELIZABETH.

THE REFORMATION RE-ESTABLISHED—SIMONY—THE STATUTE OF LABORERS—OF VAGRANTS—OF THE POOR—HOSPITALS—STATUTE OF CHARITABLE USES—OF CHURCH-LEASES—OF BANKRUPTS—FRAUDULENT CONVEYANCES—RECOVERY SUFFERED BY TENANT FOR LIFE—RECOVERIES AND FINES, EFFECT OF—SHELLY'S CASE—ARCHER'S—FEOFFMENT BY TENANT IN TAIL—FINES, STATUTE OF—JOINTURES—DEVISES OF LAND—EXECUTORS AND ADMINISTRATORS—USURY—STOLEN HORSES—ERROR IN THE EXCHEQUER CHAMBER—REMOVAL OF CAUSES OUT OF INFERIOR COURTS—PROCESS AND PROCEEDINGS—ACTIONS UPON PENAL STATUTES—OF JEOFAILS.

THE first object, at the commencement of this queen's reign, was to establish the Reformation upon the foot it was on at the death of Edward VI. (a). For this purpose was made stat. 1 Elizabeth, c. 1, The Reformation re-established.

(a) That is to say, on the footing of the royal supremacy, the *spiritual* supremacy of the crown, or its supremacy in *spiritual* matters, which had been established by Henry VIII., and had been exercised by Edward VI. for the purpose of altering the religion of the church and state. That supremacy which Henry VIII. had assumed was the same supremacy which had been formerly exercised by the pope, and was therefore purely spiritual, so far as it had ever been allowed or recognized by law, as, for instance, in the approbation of the elections of bishops, or in appeals upon spiritual matters, such as questions of faith or discipline, excommunications, dispensations, and the like. On any other matters than such as were *purely* spiritual, the law had not recognized the papal supremacy, save, perhaps, on the two subjects of matrimony and testament, of which, if the latter was exceptional and anomalous, it was an exception and an anomaly allowed by the law of England itself, and for that very reason the exception itself proved the rule, that the assertion of the papal supremacy was not recognized by the law except as to spiritual matters; so that it was in its nature purely spiritual. Hence its assumption by Henry VIII. involved and implied the assumption of a spiritual supremacy to the extent to which it had been exercised by the pope; and accordingly it had been held by the courts of law in the reign of Edward VI. that the royal supremacy *did* involve and imply just the same spiritual supremacy as the pope had exercised, inasmuch that, as the pope had claimed and been allowed by law to exercise his supremacy in spiritual acts, as supreme ordinary, without regard to the authority of the bishops, so the king had power, by virtue of the same supremacy, to exercise spiritual power and do spiritual acts, as the pope had done, and as supreme ordinary, without regard to the bishops (*Grondon v. The Bishop of Lincoln, Plowden's Reps.*). Accordingly, this having been judicially determined in the reign

which began this great work in the manner Henry VIII. had done, by first abolishing the authority of the pope. It

of Edward VI. to be the meaning of the "royal supremacy," as distinct from or added to the mere sovereignty,—i. e., a spiritual supremacy,—parliament, at the accession of the queen, proceeded most distinctly to revest it in the crown. And it will be seen by the terms of the statute, as quoted by the author, it declared that no foreign *prelate* should exercise any *spiritual* authority in the realm, and that "all such authority before exercised and used should be annexed and united to the crown." In other words, parliament, as might be expected, more expressly and more distinctly than before defined the royal supremacy as a *spiritual* supremacy, and vested in the crown *such* supremacy as the pope had exercised, which was entirely spiritual, the pope never having been permitted to exercise any other than a spiritual supremacy within the realm, and any extension of it to temporality having been always carefully and jealously guarded against; so that if that were all that had been intended, these formidable statutes, and these solemn declarations, and these new oaths were all extremely idle and futile, and there would have been no occasion to use the new phrase of the "royal supremacy." Parliament well knew that this was a new prerogative, and required statutable definitions and declarations, and so defined, declared, and enacted it as what it obviously was, namely, a purely *spiritual* supremacy. On the other hand, it is to be observed, in order to guard against a common error, and avoid a common fallacy, this was a spiritual supremacy. It is necessary to observe and to adhere to both parts of the definition of the royal supremacy thus given by the courts of law and by legislative enactment, that it was a *spiritual* supremacy. For this is what the papal supremacy was; it was spiritual, and it was a supremacy. That is to say, not an *ordinary spiritual ministry*; not an ordinary ministry of spiritual things; not the administration of the sacraments, for instance, or the exercise of ordinary pastoral and spiritual functions; not even the exercise of *ordinary* episcopal jurisdiction. All these were no parts of the *supremacy*. The application of the test supplied by judicial decisions and legislative definitions alike make this plain. It was no part of the office of the pope, *as pope*, to preach or administer the sacraments, and if he did those things, it was as priest, not as pope. Again, it was no part of the office of the pope, *as pope*, to ordain priests, or even consecrate bishops or archbishops; if he did those things, it was as bishop, as archbishop, or as patriarch. His spiritual authority, by virtue of his supremacy, was to approve of the elections of bishops and archbishops, to receive appeals from their decisions on spiritual matters, and to convene councils and correct or propound definitions of faith or of morals, or enforce the observance of spiritual discipline, or the forms of worship and ritual. All this was spiritual, and all this was involved in the papal supremacy. And all this had been vested by statute in the crown, because it was not in the crown before; and all this had been divested out of the crown by repeal of those statutes (which again showed that it was not in the crown at common law); and all this was now revested in the crown by the statutes passed under Elizabeth. An inspection of the statutes of Henry will show this clearly; an inspection of the statutes of Mary will show it more clearly; an inspection of the statutes of Elizabeth will show it more clearly still, and put it beyond a doubt. Every one of those heads or branches of papal spiritual jurisdiction which had been vested in the crown by the statutes of Henry, were divested out of the crown by the statutes of Mary, and were now revested in the crown by the statutes of Elizabeth; and this after judicial determinations describing the supremacy as embracing the purely spiritual. The act of Elizabeth, not content with a repeal of the statute of Mary,

was thereby enacted, that stat. 1 and 2 Philip and Mary, c. 8, should be repealed, and that the following statutes should

expressly one by one revives the statutes of Henry, and goes on to enact that they shall be in full force and effect, and that all branches thereof should be taken to extend to the queen as largely as any of them did ever extend to the late king Henry. And then it goes on to declare, not only that the spiritual authority of any foreign prelate, *i. e.*, the pope, shall be utterly abolished within the realm; but (in a clause omitted by the author) that "such jurisdictions, superiorities, and pre-eminence, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority, hath heretofore been, or may be, lawfully used or exercised for the visitation of the ecclesiastical state and person, and for the reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, and offences, shall forever be united to the crown." It would be impossible to imagine words more clearly and thoroughly carrying out the judicial definition of the royal supremacy already given, that it included all that the papal supremacy had been allowed to include, that is, all matters of spiritual supremacy. And it would be impossible to imagine words more clearly or more strongly embracing everything that could come within the range of a spiritual supremacy. It would not, of course, include the ministration of the sacraments, or the ordinary pastoral or episcopal functions, as ordinations, consecrations, and the like, for these were no parts of the supremacy; but it would, and was always afterwards, held to include the definition of doctrine as to the sacraments, or the correction of discipline as to their administration, or the decision of all points of dispute as to worship or ritual, faith or morals, for such was the supremacy. Only, as the actual exercise of this authority by a female sovereign might be deemed indecent, the act went on to provide that it might be exercised by commissioners, who might be ecclesiastics, but who might be partly laymen, and who, whether ecclesiastics or laymen, would derive their authority entirely from the crown. And the act went on to provide an oath, that the queen was supreme governor in spiritual causes, that is, that she had power to determine all appeals in spiritual cases; in other words, that she was the supreme and ultimate authority on all matters of faith or worship. It is true that, in a clause not noticed by the author, it was enacted that the commissioners should not have power to determine any matter to be heresy, except such as had before been so determined by the canonical Scriptures, or the first four general councils, or which hereafter shall be declared heresy by the high court of parliament, with the assent of convocation; but this was only a limitation of the authority of the commissioners, whom the crown was only empowered to appoint, and it was not a limitation upon the royal supremacy itself, and even if it was, it was only by subjecting it to the authority of parliament, which no doubt, ultimately, after the Restoration, by the Act of Uniformity, became virtually the depository of the supremacy. And so in the course of time the royal supremacy worked itself out, so to speak, into a parliamentary supremacy, which indeed was its natural inevitable development. For what was the royal supremacy but a lay supremacy? The laity, embodied in royalty, seized the supreme power in spirituals, and hence when the royal power became limited and restrained by parliament, the supremacy was so restrained, and in the results virtually transferred to parliament, as representing the nation at large. But at present we are rather concerned with what the royal supremacy was at the time of Elizabeth considered to be, and as to its real character and scope. And there never was a sovereign who had a deeper or stronger interest in upholding it to the highest and the utmost as a spiritual supremacy. So far from her having less

stand revived, namely, stat. 23 Henry VIII., c. 9, ordaining that no one should be cited out of the diocese where he

disposition than Henry to uphold it, she had infinitely more. To her it was vital. It was infinitely more than it ever could have been to him. For her title to the throne depended upon it. This will be obvious upon a little consideration. Henry had broken with Rome upon the very question as to the supremacy of the see of Rome in matrimonial causes. The see of Rome held that his marriage with her mother was invalid; he asserted the sufficiency of a local determination of its validity. It is true that the court of Rome also asserted its power to dispense with disabilities or dissolve a marriage, but it had declined to dissolve the marriage with Catherine; and the king, on the other hand, had denied the necessity for such a dissolution, and had asserted his own supremacy, and his own authority to dissolve it. For that was what was meant by his asserting his supremacy; and hence he had statutable power to appoint delegates to determine finally all appeals. The legitimacy of Elizabeth, therefore, and her common-law title to the throne, entirely depended upon the royal supremacy in a matter which had always been regarded as spiritual, *i. e.*, the validity of marriages. It is true that afterwards the marriage with her mother had been declared invalid and void by Cranmer, and disapproved by parliament; but an obstacle raised by parliament could be removed, and was removed, by parliament; and thus her title became parliamentary. But her parliament was vigorously anti-papal, and was prepared to go any lengths in upholding the royal supremacy against the papal. And as already seen, parliament had given the queen the same power Henry had of appointing commissioners to determine all ecclesiastical matters, the effect of which was, that the queen could at any moment, if she pleased, have had Cranmer's decision overruled, and her mother's marriage reaffirmed, and her own legitimacy declared, or she could have had it declared by parliament. With her characteristic prudence, she preferred to avoid reopening so delicate and disagreeable a question, and to rest upon a parliamentary title. But this was a title held only upon condition of an unsparing assertion of the royal supremacy as against the papal. Hence, all through her reign, the deference which, with all her despotic spirit, she showed to parliament, or professed to show, whenever she saw symptoms of its being displeased; and hence the rigor with which she asserted the royal supremacy and repressed the assertion of the papal. It was, so to speak, the condition upon which she held her throne. Hence there was a studious endeavor, all through this reign, to confound the temporal sovereignty with the spiritual supremacy. The measures taken at the commencement of this reign for the restoration of religion as it had been altered under Edward, was the result of a policy almost unnecessary on the part of the queen, and of servility equally interested on the part of her ministers. It could not have been the result of conviction on the part either of the sovereign or her statesmen, since she and they had alike professed to be Roman Catholics, and she had at her coronation taken the oath to protect the Roman Catholic religion. Her chief minister, Cecil, had been one of those who had received the papal legate when he came to reconcile the kingdom to the see of Rome (*Strype*, iii., 157), and he had been in communion with the Roman Catholic Church to the close of the late reign (*Dr. Nare's Memoires of Lord Burghley*). But he was a holder of church property, as most of the members of the council were; and that question of church property, as has been seen in the reign of Mary, was vital to the interests of a large body of the gentry. As regards the queen, her position was such that she could scarcely hold her crown and remain in communion with Rome. For according to the view

dwells; stat. 24 Henry VIII., c. 12, taking away appeals to the see of Rome; stat. 25 Henry VIII., c. 19, concerning

of the Church of Rome, distinctly confirmed by parliament in statutes of the reigns of Henry and of Mary, still unrepealed, she was not legitimate, and so had no title to the crown by descent. Not only the statute of Henry VIII., by which she had been pronounced illegitimate, was still in force, but another statute confirming it, passed in the last reign. And it is most remarkable that Elizabeth never ventured to propose the repeal of these statutes. It was impossible that she and Mary could both be legitimate, and the opinion of the country so strongly preponderated in favor of the legitimacy of Mary, and the validity of Catherine's marriage, that Elizabeth never proposed the repeal of the statutes declaring herself to be illegitimate. Clearly, then, she had no title to the throne by descent. Her title could only be parliamentary, and though, in her proclamations, she claimed to be right heir in blood, she took care to mention the consent of the nation; and this no doubt was her true title. The act settling her title sought indeed to blend together her presumed right from royal descent with that which she derived from parliament: but the two things were inconsistent, for if she had title by descent, the statute was idle, and the statute was founded on the supposition of illegitimacy. The statute declared that she was and ought to be rightful and lawful queen — rightly, lineally and lawfully descended, and come of the blood-royal, to whom and the heirs of her body the crown belonged as rightly as the same ever did to her father or brother, since the Act of Succession in the 35th Henry VIII.; and it then enacted that this recognition, in union with the limitation in that statute, should be the law of the realm, and that every judgment and act derogatory to either should be void and of no effect. To this was added an act which, without reversing the attainder of her mother, restored Elizabeth in blood, and rendered her inheritable to her mother, and to all her ancestors; so that these acts, which of course were idle if she was legitimate and had a good title by descent, rather seemed to recognize her illegitimacy, and to confer upon her a parliamentary title to the crown, founded entirely on statute. But it was a title utterly inconsistent with continuance in the communion of Rome, for to have sought any recognition from Rome would have implied that the title rested on the concession of Rome, and this would never have been assented to by parliament; so that *ex necessitate* Elizabeth's title was entirely parliamentary, and was entirely inconsistent with continuance in the Roman communion. This was evidently present to the minds of the queen and of parliament from the first, and hence the very first measures passed after that which settled the crown upon her was to sever all connection with Rome, and declare hostility against all adherents to the see of Rome as enemies to the state. And it is this necessary connection between the ecclesiastical question and the question of title to the sovereignty which is the key to the whole policy of the reign, and to the main features of its law and legislation. For as it affected the legislation as to the church and state, it indirectly affected all the other more important measures of the reign. The papal supremacy was at once and finally abolished, and the royal supremacy restored; and this, of course, carried with it, as it was a spiritual supremacy, the power to effect any alterations in religion. The statutes passed in the last reign for the restoration of the papal supremacy and the old religion were repealed, and the acts of Henry VIII. and Edward VI., in destruction of the papal supremacy and in alteration of the old religion, were for the most part revived. It was enacted that the Book of Common Prayer should be alone used by ministers in all churches, under the penalties of forfeiture, degradation, and death; that the spiritual authority of every foreign prelate

the submission of the clergy; stat. 25 Henry VIII., c. 20, restraining the payment of first-fruits and tenths to the see

within the realm should be abolished; that the jurisdiction for the correction of all errors, heresies, schisms, and abuses (the very words used in describing the spiritual supremacy of the see of Rome) should be annexed to the crown, with the power of delegating such jurisdiction to any persons at the pleasure of the sovereign; that the penalty for assisting the papal authority should ascend, on the repetition of the offence, from the forfeiture of real and personal property, to perpetual imprisonment, and from perpetual imprisonment to death; and that all clergymen and all laymen, suing out the livery of their lands, should, under pain of deprivation, take an oath declaring her to be supreme in all ecclesiastical or spiritual things or causes, as well as temporal, and renouncing all foreign ecclesiastical jurisdiction whatever within the realm. Thus, therefore, at the outset of the reign not only was the papal supremacy abolished, but the mere maintenance of it as a spiritual supremacy was made penal and punishable with death, and not only so, but the penalty of forfeiture of office or of lands was imposed on persons not taking the oath to maintain the royal supremacy, so that no Catholic heir could inherit his lands without renouncing his religion. What the royal supremacy really meant was soon shown. The tender of this oath of supremacy was made the means of depriving all the bishops; and then the queen, under the authority of the revived statutes of Henry, could virtually direct the appointment of new prelates in all the vacant sees, and of course take care that they were opponents of the old religion. Thus, practically, the royal supremacy involved the power of directing the religion of the church, and of settling its forms of faith and worship. For the bishops could enforce on the clergy the religion the state prescribed to them, and indeed the same means, the tender of the oaths of supremacy, excluded from their benefices all the clergy who adhered to the old faith. Thus it was made manifest what the royal supremacy meant, and it was shown that it was a spiritual supremacy. This, of course, involved the power to alter or declare matters of faith and worship, and at all events, to exercise the supreme power in so doing; just as popes had convened or dissolved councils, and approved or disapproved of their canons or decrees. That such had been the power of the pope had been recognized again and again in our courts of law, in which the pope was commonly called "the apostle," or "our holy father the pope," and the canons of council convened by him, and approved by him, and only such canons, had been often recognized as the law of the church. And some of these cases were recognized in this very reign (*Digby's Case*, 4 *Coke's Reps.*, 78). The assumption, then, by the crown of the same supremacy, that is, a spiritual supremacy, would involve the "power," if not of altering or declaring matters of faith and worship, at all events of exercising the supreme power in controlling them; which, when enforced by the power of an absolute sovereign, would come of course practically to the same thing. And so the assumption of the supremacy by Henry VIII. would practically involve and imply a power thus to alter or declare matters of faith and worship, and had been so understood and declared in the reign of Edward VI. Hence its assumption was in itself not merely a separation from Rome, but a complete and fundamental change in religion, or at least the foundation of such a change, because it was the assumption of a power to change, and therefore of a principle fundamental to the whole fabric of faith and worship. For the assumption of a power to alter or declare implied that what was held was held on the authority of this power which thus could alter and declare. And accordingly Henry, after the assumption of the supremacy, had claimed to declare, as he did in

of Rome, and for electing and consecrating archbishops and bishops; stat. 25 Henry VIII., c. 21, concerning exactions

the "Act of the Six Articles," what were the main articles of faith, and although it happened that he chose to adhere to the ancient dogmas thereupon, that was the mere result of his own absolute and arbitrary will, and it was plainly implied that, had his will been otherwise, the articles of faith declared would have been different. And so accordingly they were in the reign of Edward VI., and by degrees the old faith was departed from and altered by the royal will, and new articles of faith declared, in the exercise of that new prerogative of the royal supremacy which the courts of law in that reign held to imply all the spiritual power exercised by the pope. The author therefore observes truly that when Elizabeth resolved to establish the Reformation upon the footing it was on the death of Edward VI., she began the work in the manner Henry VIII. had done, although, when he adds that this was by abolishing the authority of the pope, he understates it, and ought rather to have said, that it was by assuming the authority of the pope. For that this was so, and that such was the real meaning of the assumption of the royal supremacy, is manifest. It had been so held in courts of law in the previous reigns, and it was so held in the present. For in the course of this reign, in a case in which a question arose upon the validity of a dispensation, discharge, and dissolution by Henry VIII. of one of the monasteries, it was laid down by the court, that it appeared by the book that the pope might have discharged a monk from his profession, and by consequence, by the statute 25 Henry VIII., c. 21 (the act of the supremacy), the king might do it; and accordingly he had discharged the monks of their order and profession (*The Case, of the Dean and Chapters of Norwich*, 3 Coke Reps., 74). It would be impossible to imagine an exercise of power more purely spiritual than this, and it was justified entirely on the ground that the statute of the supremacy vested in the king all the spiritual supremacy and power which had before been exercised by the pope. And, beyond all doubt, this was the view taken by the queen herself of her prerogative in matters of religion; and such was the power she exercised throughout the whole period of her reign. The ecclesiastical policy of Elizabeth was in thorough consistency with that of her sister, her brother, and her father. It consisted simply in the assertion of the royal supremacy in spiritual not less than in temporal matters. "The acts by which the ecclesiastical revolution was accomplished," says Sir J. Mackintosh, "consisted in the revival of all the statutes of Henry VIII. against foreign jurisdiction, which, in imitation of that monarch's equivocal language, they called restoring the ancient jurisdiction of the crown over the state ecclesiastical" (1 *Eliz.*, c. 6), "together with the revival of the Protestant statute of Edward respecting the sacrament of the altar." All spiritual jurisdiction was by the same act expressly annexed to the crown, and the sovereign was empowered to exercise it by commissioners appointed under the great seal (*Mack. Hist. Eng.*, vol. iii., c. 1). And accordingly a commission was issued to consecrate an archbishop (*Ibid.*). And commissions of delegates were issued all through the reign, for the purpose of hearing and determining appeals from the archbishop in spiritual cases. Nor was the crown content with the assertion and exercise of its spiritual supremacy; the denial of it, or the maintenance of the spiritual supremacy of the pope, was made, as under Henry, a criminal offence, punishable by fine and imprisonment, and for the third offence by death. An act passed for re-establishing the Common Prayer-Book of Edward VI. (1 *Eliz.*, c. 2); and severe penalties were denounced against all who libelled it (*Ibid.*). For this purpose, no doubt, legislation was necessary, but only for this purpose, for in the queen's view, her authority was absolute.

and impositions heretofore paid to the see of Rome, and concerning licenses and dispensations within the realm ;

The Protestant liturgy was re-introduced, the oath of supremacy administered, and although most of the bishops refused it, almost all the clergy submitted. "The majority," says Mackintosh, "consulted their interest." He adds, "Indeed, the pliancy was by no means so considerable as under Henry and Edward, partly because the progress was then gradual, partly because the clergy were engaged in the first steps of it almost by surprise, and in no small degree from the terrors of Henry's sanguinary government" (*Hist. Eng.*, vol. iii., c. 1). It is easy to perceive that the policy and spirit of this reign were precisely the same as those of Henry. The reign of Elizabeth was actuated by the same spirit as that of Henry and Mary—the spirit of arbitrary power, although, no doubt, more controlled by policy. Indeed it was more arbitrary than that of Mary, who had at all events disclaimed the title of supreme head of the church, which Elizabeth at once assumed (1 *Eliz.*, c. 1). A bill was introduced annexing the supremacy to the crown, and though the queen was there denominated governess, not head of the church, it conveyed the same extensive power which under the latter title had been exercised by her father and brother. By this act, the crown, without the concurrence of either parliament or convocation, was invested with the whole spiritual power, might repress all heresies, might alter or repeal all canons, might alter every point of discipline, and might ordain or abolish any religious rite or ceremony (1 *Eliz.*, c. 2). In order to exercise this authority, the queen was empowered to name commissioners, either laymen or clergymen, as she should think proper, and on this clause was afterwards founded the court of ecclesiastical commissions, which assumed large discretionary powers, totally incompatible with any exact boundaries in the constitution. These proceedings, indeed, were only consistent with absolute monarchy, but were entirely suitable to the terms of the act on which they were established. An act that at once gave the crown alone all the power which had formerly been claimed by the popes, but which even they had never been able fully to exercise without some concurrence of the national clergy. Whoever refused to take an oath acknowledging the queen's supremacy was incapacitated from holding any office. Whoever denied the supremacy or attempted to deprive the queen of that prerogative, forfeited, for the first offence, all his goods and chattels; for the second, was subjected to the penalty of a præmunire; but the third offence was declared treason (*Hume*, c. 38). These punishments, it will be seen, were as rigorous as those which were formerly inflicted by her father and brother in like cases. A law was passed confirming all the statutes enacted in King Edward's time with regard to religion. The nomination of bishops was given to the crown, without any election of the chapters. A bill was brought into parliament for re-establishing the liturgy of King Edward. Penalties were enacted as well against those who departed from this mode of worship as against those who absented themselves from the church and sacraments. And thus by the will of a young woman, whose title to the crown was by many thought liable to great objection, the whole system of religion was altered (*Ibid.*). It is impossible not to perceive that this was the same spirit of arbitrary power which had prevailed in the previous reigns; and that, in the view of the crown, its own authority was absolute by virtue of the supremacy in matters of religion; and that acts of parliament were only necessary to enforce its regulations by corporal pains and penalties—a view acquiesced in by parliament and upheld in the courts of law. The queen's courts, civil and ecclesiastical, determined what was a sufficient exercise of episcopal authority upon matters purely spiritual. Accordingly, in the early part of this reign, it was

stat. 26 Henry VIII., c. 14, for consecration of suffragans; stat. 28 Henry VIII., c. 16, declaring void all bulls and dispensations from the pope.

held in a case where the Bishop of Norwich had refused a presentee because he was a haunter of taverns and a player of unlawful games, that the causes stated were not sufficient, for they were not *mala in se* but only *mala prohibita* (*Dyer*, 254); and in another case in this reign, where the Bishop of Exeter had refused a presentee because he was an inveterate schismatic, it was held by a court of error to be insufficient, for that the specific cause of refusal should be stated, in order that if denied it might be brought in issue and tried by the metropolitan, or if he were dead, by a jury, (*Specot's Case*, 5 *Coke's Reps.*, 158). That is to say, that it might be determined by one of the queen's courts, civil or ecclesiastical, and even if it were determined by the archbishop, an appeal lay to the queen, although upon a matter purely spiritual. And although Lord Coke laid it down that the sovereign could not determine personally, he also laid it down that her courts or commissions could do so. Appeals were determined by a commission of del egacy issued by the crown, just as such commissions as had been issued by the pope: so the queen, like her predecessors Henry and Edward, established by the same authority the Court of High Commission, a kind of Star Chamber for religion. This was established, it is true, by statute in this reign; but that was only to invest it with greater authority; and it took cognizance of infractions of the tyrannical laws passed to impose the state religion upon the people. The fines and imprisonments imposed by this court, says Hume, were frequent. The deprivations and suspensions of the clergy for nonconformity were numerous, and comprehended, at one time, a third of all the ecclesiastics of England. The queen, in a letter to the Archbishop of Canterbury, said expressly that she was resolved that no man should be suffered to decline, either on the right hand or the left, from the drawn line, limited by authority, and by her laws and injunctions (*Hume*, vol. v., App.). "The queen," says the historian, "to restore unity in the church, appointed as primate a stern inquisitor, and placed in his hands a commission comparable only to that celebrated tribunal which, in England, has been regarded as the most odious in the world, with jurisdiction to reform all heresies, error—in short, all acts and opinions—by fine and imprisonment at pleasure, and even with the power not only of demanding subscriptions to new articles, but of scrutinizing the consciences of suspected persons by administering oaths" (*Ibid.*). In short, the inquisition was established, as it had never before existed in England. "Proceedings so tyrannical excited general indignation, but Elizabeth and the archbishop did not the less succeed in restoring unity to the church. And when the Commons offered a remonstrance, Elizabeth rebuked them in a tone of spiritual supremacy not exceeded by the pope" (*Mack. Hist. Eng.*, vol. iii., c. v.). The only legal ground for this monstrous tribunal, says the historian, in a country pretending to law and liberty, was a clause in the Act of Supremacy. If such power were conferred by it, the sovereign was absolute; if it was not conferred, Elizabeth set herself above the law (*Ibid.*). There is no doubt it was so conferred. It is an undoubted fact that such commissions had been issued by Henry VIII. and Edward VI., without any other statute to authorize them, save and except the Act of Supremacy. And the first statute of this reign conferred on the queen the supremacy over the church in as ample a manner as had been enjoyed by Henry VIII. and Edward VI.; and the only clause in the act which authorized the commission authorized it to "execute all jurisdiction heretofore lawfully exercised concerning spir-

Besides these, which more directly concerned the papal authority, it was also declared that so much of stat. 32

itual matters within the realm," *i. e.*, to exercise the royal supremacy which was thus declared to be a spiritual supremacy; and it was designed to correct all errors, heresies, and schisms, which belonged to every ecclesiastical authority (*vide c. xxxv.*). The only qualification of this jurisdiction, that nothing should be adjudged heresy but such as had been so adjudged by the canonical scriptures, was illusory, and left all open to a power entirely arbitrary, for it was the commissioners themselves who were to determine what was such heresy. It is obvious that the enactment was only enabling, not restrictive, and that it only gave the crown a power to delegate its authority. But the power delegated already existed by virtue of the enactment of the supremacy; and that authority, which could thus be delegated, could of course be exercised by the crown without such delegation. Hence, in the next reign, when the archbishop maintained this view, and referred to the above enactment, coupled with the notorious fact that Henry and Edward, without such statutory power, had exercised such authority, and appointed such commissioners as Lord Coke, the judges only relied on the words "such jurisdiction concerning spiritual matters as had been lawfully exercised" (12 *Coke*, 85). But that came to nothing, or rather supported the archbishop's view; for beyond all doubt the authority of the pope in matters spiritual had always been exercised and recognized by law, and had never been disputed in the whole course of our history, and it had been exercised either within the realm by commissions, or at Rome in person. And, after all, what Lord Coke appears to have maintained was only this, that the commission could not fine or imprison, or impose any temporal penalties, without statutable power; in which he was no doubt right, for no more could the pope have done so, or the bishops in their spiritual courts, without the authority of the civil law. But within that limit, even Lord Coke, jealous as he was of this arbitrary tribunal, never disputed its legality or authority. It was indeed held at the close of the reign that it could not issue process of arrest but only by citation, like the ecclesiastical courts (*Case of the High Commission*, 12 *Coke*, 50). But that in effect affirmed and applied its authority; and so it was affirmed in many other cases. It is stated by Lord Coke himself that the commissioners all through this reign did exercise their jurisdiction, and the judges only doubted their power to imprison. And when in the next reign the archbishop asserted the power of the crown to determine all matters personally, it is to be observed that Lord Coke only ventured to dispute the proposition as to matters of ordinary criminal law, as treason or felony, the determination of which was by the common law given to the courts of law (12 *Coke*, 641). But the papal supremacy had been exercised personally or by commission, and the courts had held that it was transferred to the crown. Hence it followed that it could be exercised personally or by commission, and in the previous reigns it had been so exercised, and it continued to be so exercised all through this reign, and was never doubted or disputed, except so far as it was enforced without statutable authority as by corporal penalties, by fine or imprisonment. The queen, indeed, in the 5th year of her reign, published the following explanation of her supremacy. She forbade her subjects to give ear to the perverse and malicious persons who notified to them how, by the words of the oath, it may be collected that the kings or queens of this realm, possessors of the crown, may challenge authority and power of ministry of divine service in the church. For her majesty neither doth nor ever will challenge any other authority than that was challenged and lately used by King Henry VIII. and Edward VI., which is and was of ancient time due to the imperial crown of this realm —

Henry VIII., c. 38, concerning precontracts and degrees of consanguinity as was not repealed by stat. 2 and 3 Ed-

that is, under God, to have the sovereignty and rule over all manner of persons within these her realms and dominions, of whatever estate, either ecclesiastical or temporal, so as no other foreign power shall or ought to have any superiority over them. And if any person that hath conceived any other sense of the form of the oath shall accept the same with this interpretation, her majesty is well pleased to accept every such in her behalf as her good and obedient subjects, and shall acquit them of all manner of penalties contained in the act against such as shall obstinately refuse to take the oath (*Lingard*, vol. vi., App.). But this was clearly sophistical, and irreconcilable with the law as laid down, and the plain meaning of the statutes. As the question of the nature and extent of the royal supremacy has lately been in various ways revived, and has assumed great interest, and, as the statutes of Mary repealed the statutes of Henry VIII. on the subject, the question rests mainly on the reviving statutes of Elizabeth, it is desirable to direct particular attention to their terms and effect, and to contemporary proofs of their object and meaning, and the sense in which they were enacted and understood. The scope of these reviving statutes of Elizabeth has been thus truly stated by the learned editor of *Blackstone*: "As Queen Mary, by 1 and 2 Philip and Mary, c. viii., had repealed all the statutes made in the time of her father derogatory to the see of Rome, and had fully reinstated the pope in all his former power and jurisdiction in this country, Queen Elizabeth, to show her attachment to the Protestant cause, by the first parliamentary act of her reign, repealed this statute of Mary, and re-enacted all the statutes relating to the church passed in the reign of Henry VIII." (*Blackstone*, vol. i., p. 279). The 1 Elizabeth, c. 1, passed in 1558, enacted that the acts of Philip and Mary, other than such as were expressly excepted and would affect this question, should be repealed. The plain effect of this was, that the statutes of Henry, with those express exceptions, were revived and re-enacted; and those statutes declared the crown supreme in spirituals. The oath of supremacy was re-established and interpreted in the following proclamation: "The queen would that all her subjects should understand that nothing was, or is, or shall be meant or intended by the oath to have any other duty or allegiance required by the oath than was acknowledged to be due to the kings Henry VIII. and Edward VI." (*Carduell's Documentary Annals*, vol. i., p. 232). What that was had been abundantly declared by the plain terms of statutes, and by express judicial decision, that is, it meant the same spiritual supremacy which the pope had exercised as supreme ordinary (*Grendon v. The Bishop of Lincoln*, *Plowden's Reps.*). And further, it was declared in the proclamation, "For certainly her majesty doth not challenge any other authority than that was challenged and lately used by the said kings." What that was, has been amply shown, viz., a supreme authority in spiritual matters, and a power to declare and define faith and worship, which is (it is falsely added), "and was of ancient time due to the imperial crown;" whereas, as has been seen, it had never been asserted until the reign of Henry VIII., and it is then as falsely described thus: "That is, under God, to have the sovereignty and rule over all manner of persons born within the realm, of what estate, ecclesiastical or temporal, they be, so as no other foreign power shall or ought to have any superiority over them"—any superiority, i. e., spiritual or temporal—and as some one must have supreme spiritual authority over them. This, though artfully disguised, plainly and necessarily meant that the spiritual supremacy was in the crown. This was placed beyond a doubt by the statute 5 Elizabeth, c. 1, which declared that the oath should be taken and expounded as in the proclamation—that is to say, to acknowledge in the

ward VI., c. 23, and stat. 37 Henry VIII., c. 17, empowering doctors of the civil law, being married, to exercise

queen no other authority than was challenged and used by the kings Henry VIII. and Edward VI. As to which—that is, as to the authority which they had challenged and used—no one surely could have any doubt; and it is to be remembered that Edward VI. had claimed to go further even than his father, and by the royal authority to alter the formularies of faith and worship, although the assistance of parliament was, for the sake of penal sanctions, invoked and obtained. Whatever, then, the supremacy had been under Henry or Edward, that was expressly asserted by Elizabeth and acknowledged by parliament, and undoubtedly exercised; and such is the depth of the aversion nowadays entertained by every devout person to the idea of a spiritual supremacy in a lay power, that the most ingenious verbal criticisms, not to say sophisms, are resorted to in order to evade the force of the plain effect of the statutes on the subject. Thus, in the course of recent debates in parliament on a cognate question, an eminent man, whose sacrifices to conscientious conviction would invest with dignity and entitle to respect any scruple or opinion he might entertain (Sir R. Palmer), strongly contested the above view, and observed, alluding to the 37th article—"There was no idea of a proper spiritual as distinguished from a proper temporal jurisdiction. It was one undivided supremacy. And with regard to the title 'supreme head,' if he did not greatly mistake, that particular part of Henry VIII.'s legislation as to that title was not re-enacted in the reign of Elizabeth, in order to avoid that very confusion of ideas which the article he had quoted was intended to exclude." And this argument was developed by a distinguished churchman (Mr. Hubbard) thus: "The part of Henry's legislation enacting the title 'supreme head' was not re-enacted 'until the reign of Elizabeth.' In truth, after its repeal by 1 and 2 Philip and Mary, it never was re-enacted. It was said that, owing to an error which has been reproduced in every copy of the 'Statutes at Large,' their marginal notes state that the statute 26 Henry VIII., c. i., was revived by statute 1 Elizabeth, c. i., and this assertion is repeated in the works of several eminent commentators; but the assertion is unquestionably erroneous, as any one may see by a careful examination of the statute 1 Elizabeth, c. i. And it is said that there is no statutable authority for ascribing to the sovereign the title of 'supreme head of the church.' That title was borne by Henry VIII. and Edward VI.; it was abolished by Mary; and it is notorious that Elizabeth, rejecting as profane the title borne by her father and brother, took as the designation of her own office and prerogative that of 'supreme governor of this realm,' as well in spiritual 'and ecclesiastical causes as temporal.'" But the fallacy of this, although manifest enough upon reflection, was at once and unanswerably exhibited by an able writer, who observed: "Agreeing with Mr. Hubbard, that the doctrine of the supremacy of the crown ought to be understood and stated as clearly as possible, I cannot think that the minute error which he supposes himself to have discovered, is of the slightest importance. The whole force of the royal supremacy, whatever it be, lies not in the word 'head' or 'governor,' but in the word 'supreme,' and in the attributes of supremacy which are ascribed to it in the 26th of Henry VIII., c. i., viz., that 'to the imperial crown of this realm shall be united and annexed such jurisdiction, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual and ecclesiastical power or authority hath heretofore, or may lawfully be exercised or used for the visitation of the ecclesiastical state or persons, and for reformation, order, and correction of the same.' This summary of the statute of the 26th of Henry VIII., c. i., was expressly re-enacted by the 2d of Elizabeth, c. i., for Ireland, and is not, so

ecclesiastical jurisdiction; and all parts of it not repealed in the time of Edward VI. shall continue in force. And,

far as appears, proposed to be repealed by the present Irish Church Bill. A like summary, the same in substance, though somewhat less ample in phraseology, is re-enacted by the 8th of Elizabeth, c. i., s. 2, for England generally. How little difference is made in the legal or religious importance of these acts by the substitution (in deference, it is said, to the personal scruples of Elizabeth) of the word 'governor' for the word 'head,' appears, if proof were needed, from the whole subsequent tenor of legal and theological authorities. Burns (*Ecccl. Law*, vol. iv., 685), after reciting the style and title from 26 Henry VIII., c. i., 'of the Church of England, and also of Ireland, in earth the supreme head,' adds: 'These are the words which seem to be understood in the abbreviated style of the king, as it is now usually expressed ("Defender of the faith, and so forth").' And so in common parlance, and occasionally in statutes of the realm—one especially in the reign of Anne—the title has been retained ever since. In a matter so purely verbal, it would hardly be worth while to insist on correctness, were it not that the plea of a verbal change has sometimes led to the erroneous supposition that the doctrine of the supremacy of the law and of the crown, which statesmen and divines of the English Reformation held to be so important, has itself been abandoned." All contemporary authority entirely supports the view which has been above presented. Thus, as it was well said during a recent controversy on the subject: "Hooker, writing actually in the reign of Elizabeth, devotes no less than thirty pages to the express purpose of the 'vindication of the title supreme head of the church within the king's own dominions,' without the slightest indication that he—the greatest theologian of his time and of the English Church—thought it 'profane' or saw any essential distinction between that title and the corresponding word 'governor.'" The doctrine of the Church of England on the subject was thus laid down by Hooker in his "*Ecclesiastical Polity*," book viii., of the kingly prerogative and power: "We are on all sides fully agreed that there is not any restraint or limitation of matter for regal authority and power to be conversant in but of religion only; and of whatsoever cause therein appertaineth kings may lawfully have charge; they may lawfully therein exercise dominion, and use the temporal sword. Secondly, that some kinds of actions conversant about such affairs were denied unto kings; as actions of power and order, and of spiritual jurisdiction which hath with it inseparably joined power to administer the sacraments, power to ordain, to judge as an ordinary, to bind and loose, to excommunicate, and the like . . . These are the powers which the 37th article disclaims; and they are, it will be seen, as Hooker clearly explains, powers which have nothing to do with supremacy, seeing that they are ordinarily incident to the effect of the episcopate—whence the very phrase ordinary; whereas the pope, as the courts of law expressed it, was 'supreme ordinary.'" Hooker proceeds: "Our judges in causes ecclesiastical are either ordinary or commissary: ordinary, those whom we term ordinary, and such by the laws of this land are none but prelates only, whose power to do that which they do is in themselves, and belonging to the nature of their ecclesiastical calling." "We see it truly a thing necessary to put a difference as well between that ordinary jurisdiction which belongeth unto the clergy alone, and that commissary whenever others are for just considerations appointed to join with them, as also between both these jurisdictions and a third whereby the king hath transcendental authority, and that in all causes over both" (*Ibid.*). Thus we see Hooker distinguishes between that ordinary jurisdiction which the episcopal office implies, and that supreme jurisdiction, or, as he calls it, "tran-

bating all these acts, every other act repealed by the said stat. 1 and 2 Philip and Mary, c. 8, is to continue repealed.

scendental," which he expressly says is exercised by the crown, and over the bishops as well as the laity, and in all causes spiritual as well as temporal; a view entirely in accordance with the decisions of the courts of law. This view is fully confirmed by the terms of the 37th article, although framed with the design of explaining the supremacy, if not of explaining it away. The 37th article said: "The king's majesty hath the chief power in this realm of England and other his dominions, unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all cases doth appertain, and is not, nor ought to be, subject to any foreign jurisdiction. Where we attribute to the king's majesty the chief government, by which titles we understand the minds of some slanderous folks to be offended, we give not to our princes the ministering either of God's Word or of the sacraments, but that only prerogative which we see to have been given always to all godly princes in Holy Scripture by God himself—that is, that they should rule all states and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil-doers." That is to say, the article only disclaims the assertion of the right to preach or administer the sacraments, which is no part of the supremacy, but asserts the royal supremacy in all matters spiritual or ecclesiastical; *i. e.*, in the determination of all ecclesiastical causes, which of course involves the determination of matters of doctrine, and the definition and determination of matters of faith. And accordingly that power—the same power which the pope had exercised—has been exercised ever since the assertion of the royal supremacy, and still is exercised. For as before that time the pope sent "commissioners of delegates" into this country to hear appeals in spiritual cases, the act 25 Henry VIII., c. xix., s. 4, gave power to the crown to appoint such delegates; and by the 3 and 4 W. IV., c. xli., the power was vested in the judicial committee of the privy council, which is the supreme appellate tribunal in spiritual cases, and exercises the judicial jurisdiction over matters of faith and worship which the pope formerly exercised. Thus, therefore, the spiritual supremacy of the see of Rome was transferred to, and has ever since been exercised by, the crown. All this would seem to be so clear that it might well be thought impossible to gainsay or deny it, but for the strength of the feelings which the question arouses. The highest legal authorities support the same view. Lord Chief-Justice Coke says: "The ancient law of this realm, this kingdom of England, is . . . a monarchy consisting of one *head*, which is the king, and of a body consisting of several members, which the law divideth into two parts, the clergy and laity, *both* of them next and immediately under God subject and obedient unto the *head*." And the same view is adhered to and enforced throughout his work. These views of the nature of the royal supremacy are confirmed by the high authority of Blackstone, who says: "The king is, lastly, considered by the laws of England as the head and supreme governor of the national church. To enter into the reasons upon which this prerogative is founded is matter rather of divinity than of law." If that, as the eminent person alluded to described it, was satisfied by jurisdiction in the civil courts, how was it "matter of divinity"? But Blackstone went on to say: "I shall, therefore, only observe that by statute 26 Henry VIII., c. 1 (reciting that the king's majesty justly and rightfully is and ought to be the supreme head of the Church of England, and so had been recognized by the clergy of this kingdom in their convocation), it is enacted that the king shall be reputed the only supreme head on earth of the Church of England, and shall have,

Consistently with the same views, the stat. 1 Edward VI., c. 1, for receiving the sacrament in both kinds, was re-

annexed to the imperial crown of this realm, as well as the title and style thereof, as all jurisdictions, authorities and commodities, to the said dignity of supreme head of the church appertaining." Blackstone next proceeded to tell what was the effect of that common law and statute law prerogative. First he said: "In virtue of this authority the king convenes, prorogues, restrains, regulates and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the crown long before the time of Henry VIII., as appears by the statute Henry VI., c. i." Then in the next place he said: "From the prerogative also, of being head of the church, arises the king's right of nomination to vacant bishoprics, and certain other ecclesiastical perferments; which will be more properly considered when we come to treat of the clergy. I shall only here observe, that this is now done in consequence of the statute 25 Henry VIII., c. xx. As head of the church, the king is likewise the *dernier ressort* in all ecclesiastical causes; an appeal lying ultimately to him in Chancery from the sentence of every ecclesiastical judge." In the next reign it was laid down by all the judges, that the king hath the supreme ecclesiastical power, which he had delegated to the commissioners, whereby they had the power of deprivation by the canon law of the realm, and that the statute 1 Elizabeth, c. x., s. 18, which appointed commissioners to be made by the queen, doth not confer any new power, but explain and declare the ancient power. And therefore they held it clear that the king, without parliament, might make orders and constitutions for the government of the clergy, and deprive them, if they obeyed not; and so the commissioners might deprive them. But they could not make any constitutions without the king (*Cro. Jac.*, xxxii.). This view was insisted upon by the queen all through the reign, and was acquiesced in by parliament, and, it will be seen, it was affirmed by the courts of law. The crown was absolute on matters of religion, except so far as restrained by statute. Parliament was only resorted to in order to enforce the queen's regulations by penalties of fine, imprisonment, or death. The queen declared that her purpose in summoning parliament was to have laws enacted for the fuller enforcement of uniformity in religion,—that is, laws she herself dictated,—for she enjoined them to meddle neither with matters of state nor religion, and required that no bill regarding either state affairs or reformation in causes ecclesiastical be exhibited in the House. The queen having thus expressly pointed out both what the House should do and should not do, the Commons were as obsequious to the one as to the other of her injunctions. They passed a law against recusants; such a law as was suited to the severe character of Elizabeth, and to the persecuting spirit of the age. It was entitled, "An Act to retain Her Majesty's Subjects within due Obedience;" and it was enacted that any person who refused, during a month, to attend public worship, should be committed to prison, and that if, after being condemned for this offence, he persisted three months in his refusal, he must abjure the realm, and that if he refused this condition, or returned after banishment, he should suffer capitally as a felon (35 *Eliz.*, c. i.). This law, it will be observed, like the laws of Henry VIII., bore especially hard upon the Puritans and the Catholics, and had been imposed by the queen's authority, but was in that respect certainly much contrary to the real sentiments of the majority in the House of Commons (*Hume*, c. xliii.). So manifest is it that the persecuting laws, in this and in previous reigns, had their origin far more in royal tyranny than religious bigotry. That which inspired them was not so much zeal for any particular religion as resentment at opposition to the arbitrary will of the sovereign. Measures which im-

vived. And, lastly, the stat. 1 and 2 Philip and Mary, c. 6, which had revived the stats. 5 Richard II., stat. 2, c. 5,

posed penalties on *both* religious parties could hardly have proceeded from either. Well might the historian say: "Scarcely any sovereign before Elizabeth, and none after her, carried higher, both in speculation and practice, the authority of the crown" (*Ibid.*, c. xl.); and as he also observes: "The principles of real liberty which, during some reigns, had been little avowed in the nation, were totally incompatible with the present exorbitant prerogative" (*Ibid.*). Her authority was upheld on all occasions with the most unrelenting severity. "After the suppression of a rash and hasty insurrection, not less than eight hundred persons suffered at the hands of the executioner. A man who had brought over a papal bull of excommunication was condemned and executed" (*Ibid.*). The historian, after describing how submissive parliament was, declares that the authority of the crown was absolute (*Ibid.*). "Her laws upon religion were extremely oppressive. It was enacted that whosoever should, by papal bulls, reconcile any man to the Church of Rome, should, as well as those reconciled, be guilty of treason. This went beyond any law enacted by Henry. The prerogatives of this sovereign were scarcely ever disputed, and she employed them without scruple" (*Hume*, vol. v., App. iii.). But, as the historian observes, she only supported the prerogatives transmitted to her by her predecessors. They were the examples of her power. It was the policy of the dynasty. Burleigh proposed that she should erect a court for the correction of all abuses, and should confer on the commissioners a general inquisitorial power over the whole kingdom. He set before her the example of her wise grandfather, Henry VII., who, by such methods, extremely augmented his revenue; and he recommends that this new court should proceed as well by the direction and ordinary course of the laws, as by virtue of *her majesty's supreme and absolute power, from whence law proceeded* (*Ibid.*). Well might the historian compare the government of Elizabeth to that of a Turkish despot, and well might the historian observe: "A form of government must be very arbitrary indeed in which a wise minister could have made such a proposal to the sovereign" (*Ibid.*). The topics which were advanced in parliament, and which were admitted, will appear the most extraordinary to such as are prepossessed with an idea of the privileges enjoyed by the people during that age, and of the liberty possessed under the administration of Elizabeth. It was asserted that the queen inherited both an enlarging and restraining power; by her prerogative she might set at liberty what was restrained by statute or otherwise, and by her prerogative she might restrain what was otherwise at liberty. That the royal prerogative was not to be canvassed, nor disputed, nor examined, and did not even admit of any limitation; that absolute princes, such as the sovereigns of England, were a species of divinity; that it was in vain to attempt tying the queen's hand by laws or statutes, since, by means of her dispensing power, she could loosen herself at pleasure; and that, even if a clause should be annexed to a statute excluding her dispensing power, she could first dispense with the clause, and then with the statute (*Hume*, c. xlv.). In the first ten years of the reign of Elizabeth, which, as Mackintosh says, were a season of undisturbed quiet (*Hist. Eng.*, vol. iii., c. iii.), parliament sharpened the severity of the Act of Uniformity by making the second offence against it spiritual, if by an ecclesiastic after admonition, committed in word or writing, tending to defame the Prayer-Book (5 *Eliz.*, c. i.); so that here was a statute passed deliberately and expressly to render opposition to the established religion punishable by death. "The oath of supremacy," continues the historian, "was declared by this statute to import no more than that the queen was to have the sovereignty and

stat. 2 Henry IV., c. 15, and stat. 2 Henry V., c. 7, against heresies, was repealed. Thus were all the supports of

rule over all persons within her dominions, an interpretation conformable to the instructions issued by the ecclesiastical commissioners, who had copied it from the ambiguous and evasive laws of Henry VIII." (*Ibid.*), so entire was the policy of the two reigns. The same exercise of arbitrary power characterized both. Persons were committed to prison for hearing the mass, committals, says the historian, which, even on the largest construction of the Act of Uniformity, were of doubtful legality (*Ibid.*). And these oppressive laws were passed and enforced during the first ten years of the reign, a period of undisturbed quiet, merely from the spirit of arbitrary power and the love of tyranny which is incident to it. But Mackintosh departs from his usual candor in professing not to know of many executions under these sanguinary laws. It is no wonder that the queen, in her administration, should pay so little regard to liberty, while the parliament itself, in enacting laws, was entirely negligent of it. The persecuting statutes which they passed against Papists and Puritans were extremely contrary to the germs of freedom, and accustomed the people to the most disgraceful subjection. Their conferring an unlimited supremacy on the queen, or, what was worse, acknowledging her inherent right to it, was another proof of their voluntary servitude. The law of the 23d of the reign, making seditious words capital, was also a very tyrannical statute, and a use no less tyrannical was made of it. A Puritanical clergyman had published a book, in which he inveighed against the government of bishops. It was pretended that the bishops were a part of the queen's political body, and to speak against them was really to attack her, and was therefore felony by the statute. A verdict of death was given against him; so that it was actually averred that the bishops were simply, so to speak, the limbs of royalty. So the Roman Catholic priests were executed in numbers for denying the authority of the queen, though they only disputed her spiritual supremacy; that is, they denied the royal authority in matters of religion. It is manifest that all through this reign the law and legislation upon the subject of religion were pervaded by the principle that the crown, by virtue of its supremacy, its spiritual supremacy, had authority to regulate matters of faith and worship, and that it was only necessary to resort to parliament in order to enforce these regulations by corporal pains and penalties (for even in that age it was not admitted that the crown could, by its own will, inflict such penalties without statutable authority), and that it was the duty of parliament to pass measures for that purpose. Our author himself, in the last chapter, shows that this was the view taken by the queen, and acquiesced in by parliament throughout her reign, and that she never would allow matters of religion to be discussed in parliament. It would have been strange if she had, for it would have been entirely inconsistent with the prerogative of the royal supremacy asserted by the crown, with the sanction of parliament, and declared by repeated statutes. For that was the prerogative of the royal supremacy, of the supremacy of the crown, not of parliament; and it was declared by the courts of law to be spiritual supremacy, such as had been exercised by the pope. The queen therefore, it is conceived, was clearly right in her view of the law, and most undoubtedly she upheld that view during the whole of her long reign. And shortly after the close of her reign, at the early part of the next reign, when the sovereign was of a much weaker character, it was solemnly declared by all the judges of England, that such was the law, and that the crown could, of its own authority (save so far as any statute expressly restrained it), make or ordain canons and decrees on matters of religion, and enforce them on the clergy by pain of depri-

papal jurisdiction once more removed ; and the parliament left at liberty to declare, that no foreign prince, person,

vation (*Cro. Jac.*, 37). It is impossible not to see that the prerogative of the spiritual supremacy was one of tyranny. In order to understand the ancient constitution of England, there is not a period, says Hume, which deserves more to be studied than the reign of Elizabeth. This, however, must be understood, as he explains in his note, that which prevailed before the great political revolution, which concerned the settlement of our present plan of liberty, ancient as compared with the modern constitution ; for certainly, as the historian himself elsewhere observes, at no period of our history had our sovereign greater power than under this Tudor dynasty, nor among them had any more power than Elizabeth. He says, probably alluding chiefly to the sovereigns of this dynasty, "She only supported the prerogatives transmitted to her by her predecessors ;" that is, her predecessors as far back as Edward IV., whose reign, we have seen, inaugurated the epoch of arbitrary power. Previous to that reign it would be difficult to find such arbitrary power exercised at any period of our history. As before the separation from Rome the king's courts, on writs of *quare impedit* or prohibition, exercised their jurisdiction as sovereign and supreme, and determined what was spiritual and what was temporal ; so they continued to do, and by prohibition restrained the spiritual authorities from interfering with temporalities, or by mandamus compelled them to exercise their spiritual jurisdiction, when the vested interests and rights of parties required it to be exercised (*Rex v. Bishop of Ely*, 1 Wm. Blackst., 70). But that is not all. The appellate jurisdiction, indeed, is vested nominally in the crown instead of the pope, but it is by statute rarely exercised by a tribunal established by statute, and on which the nation places reliance ; and those limits are just the same now as before the Reformation, except as to the appellate jurisdiction above and beyond the archbishops. The nature of what is spiritual, and the limits of the spiritual and temporal, remain exactly as they were before ; and up to the archbishops, the spiritual jurisdiction remains the same. Thus, for example, the Act of Uniformity, 13 and 14 Car. II., c. iv., s. 19, having enacted that no person shall be allowed to preach as a lecturer in any church, etc., "unless he be first approved and thereunto licensed by the archbishop of the province, or bishop of the diocese," etc., the court will not entertain a motion for a mandamus to the bishop to license a lecturer appointed by the parish upon the previous refusal of the bishop to do so, upon the alleged ground of unfitness in the party elected, unless it be shown that the application had also been made to the archbishop, and rejected by him (*Rex v. Bishop of London*, 13 East, 419). And even then all that the court, *i. e.*, the crown, could do would be to direct the archbishop to exercise his jurisdiction, and if he returned that he had made diligent inquiry concerning his conduct and ministry, and being convinced from such inquiry that he was not a fit person to be allowed to lecture, he had conscientiously determined, after having heard him, that he could not approve or license him, that would be sufficient (*Rex v. Archbishop of Canterbury*, 15 East, 117). So the spiritual jurisdiction, whether of bishop or rector, is never interfered with by the temporal courts (*Rex v. Bishop of London*, 1 T. N., 371). Thus all matters as to the national religion were really settled and established by the representatives of the nation in Parliament, and as the royal supremacy was restrained within these statutes, it really, as exercised before the Rebellion, and especially in this and the previous reigns, ceased to exist. It is an entire error to think and speak of the royal supremacy as it exists and is exercised now, as if it had any resemblance to that exercised by the Tudor sovereigns. There is only this resem-

prelate, state or potentate, spiritual or temporal, shall use, enjoy, or exercise any manner of power, jurisdiction, su-

blance, that it is a lay supremacy, a supremacy of the laity over the clergy. But it is a supremacy defined and limited by law according to the national will, and the courts of law do not at all interfere with the exercise by the bishops and archbishops of their proper spiritual functions, within the limits defined by the law, that is, by the national will. By the 13 and 14 Charles II., c. iv., the Uniformity Act, ministers are to use the administration of the sacraments and public prayers, with the additions and alterations made by Convocation, as in the Book of Common Prayer. They are to declare their unfeigned assent, and subscribe the declaration. The Thirty-nine Articles are to be subscribed, and lecturers, preachers, etc., are to be licensed by the archbishop or bishop. Those resident are to read the service once a month, and no person is to administer the sacrament before he is ordained priest. This is the law as to ordinary duties of the clergy. The 6 Anne, c. xxi., enacted as to cathedrals, that statutes used in the government of cathedral and collegiate churches used since the Reformation, founded by Henry VIII., are to be good and valid; but the queen may alter or make new statutes for settling visitations. By the 12 Anne, c. xii., curates licensed by the bishop are to be appointed by him when necessary, at such stipends as he shall think fit. It was not until after the great rebellion, which the exercise of this monstrous prerogative in matters of religion went far to provoke, that its exercise was really restrained by statute. The statutes of this reign, it has been seen, merely registered the arbitrary edicts of the crown, and enforced them by pains and penalties. So thoroughly were these principles imbibed by the people during the reign of Elizabeth and her predecessors, that opposition to them was regarded as the most flagrant sedition, and was not even rewarded by that public praise and approbation which can alone support men under such dangers and difficulties as attend the resistance of tyrannical authority. Gifford, a Protestant clergyman, was suspended for preaching up a limited obedience to the civil magistrate (*Hume's Hist. Eng.*, vol. v., App. cii.); that is, an obedience limited as to spiritual matters by the freedom of the subject, or, at all events, defined by the authority of parliament. This, however, was never acknowledged by the crown in this reign, nor even in the next. All through this reign the crown stood upon the prerogative of the royal supremacy in spiritual matters. But after the Rebellion, when the supreme power of the state was represented not merely by the crown, but by parliament, the exercise of the prerogative of the supremacy was restrained by statute; and parliament, as representing the nation at large, really settled what the national faith and worship should be. All this, however, has taken place since the Revolution. The law and legislation of the present reign upon the subject of religion were based upon the principle of despotism, and in that respect were marked by the same spirit as that which had pervaded the reign of Henry VIII. and Edward VI. In a word, it was the spirit of tyranny. So the rapacity which characterized the previous reigns was equally characteristic of the present. The conduct of Elizabeth with regard to the church was worse than that of the worst tyrants of the Norman sovereigns. She kept sees vacant in order to enjoy the temporalities, and actually kept one see vacant for the long period of nineteen years. She never lost an opportunity of plundering a see of some part of its temporalities, and the measures passed in restraint of ecclesiastical leases were only to prevent any one plundering the church but herself. During the whole of her reign the confiscatory laws passed under Henry VIII. and Edward VI. were rigidly enforced, and all colleges, or hospitals, or charities which had escaped their rapacity were seized by the queen. The system of

periority, authority, pre-eminence, or privilege, spiritual or ecclesiastical, within this realm, or any of her majesty's

confiscation involved many charities not obnoxious to the law. And this produced consequences which had not been anticipated, and which led towards the close of the reign to important legislation. It must here again be noticed that the author so disregarded the historic method and the order of time that there are included in this chapter, just after the measures on the subject of religion passed in the first year of the reign, various important statutes not passed until the end of the reign, nearly forty years afterwards, such as the Poor-Law and the Act of Charitable Uses. These measures, however, were the indirect result in one degree of the measures of confiscation passed in previous reigns. It has been remarked in the prefatory notes to previous reigns of this dynasty that the changes in our law are often to be traced to causes apparently remote, and that the alterations in the law caused by the great religious revolution which occurred at this period of our history had effects and results which, at first view, could never have been supposed to have arisen from causes apparently so remote. And this will be found to have been remarkably exemplified in the legislation of this reign. In the statute of Edward VI. as to vagrants, it was recited that the number of vagrants and vagabonds had become greater than in any former reign. There can be no doubt that this was in a great degree owing to the suppression of religious houses under Henry VIII., though it was also in some measure ascribable to the gradual decline of villenage and the natural tendency of the villeins to wander away and become vagrants. In the present reign both these causes contributed to a large increase of pauperism and vagrancy, and another cause co-operated, viz., the corporations which took place under the act of Edward VI. for the abolition of charities and obits or endowments for masses for the dead. This measure had a far larger operation than perhaps had been intended, for this reason, that in those times there were few charitable endowments which were not more or less associated with such objects, for the founders or donors could almost always desire masses to be offered for their souls. The indirect result, therefore, was to confiscate all the existing charitable endowments,—at all events, so far as the statute was strictly enforced; and although the courts strove to rescue them whenever they could,—that is, whenever the charitable object was severable from their superstitious use,—they could not often be severed; and hence the books of this long reign are full of records and reports of cases of confiscation of charities under that act. Hence, while the number of the poor was increasing, they were more and more deprived of all relief or support, and hence the poor were becoming paupers and vagrants, even becoming mendicants. These causes led, towards the end of the reign, to the two great measures, the Poor-Law (43 *Eliz.*, c. 2), and the Statute of Charitable Uses (43 *Eliz.*, c. 4). Both these two great acts, it will be observed, were passed in the same year (*Ibid.*), almost the last of the queen, and after fifty years had passed, during which the measures referred to had been in operation, and after the confiscation of charities had produced their natural results. It should be observed, also, that during this reign, villenage, though still in existence, was gradually dying out, and the last case of villenage occurred in the last year of this reign (*Dighton v. Bartholomew, Yelverton's Reps.*). The result of the dying out of villenage was the increase of vagrants, and also a tendency to the overcrowding of trades and employment. Hence the statutes as to artificers, passed in the earlier portion of the reign. Other legislation of this reign arose in some degree from the character of its law and legislation as to religion. The characteristics of that law and legislation were, it has been seen, despotism and persecution, and these are sure to result in hypocrisy

dominions; and all such power and authority before exercised and used was thereby united and annexed to the crown; and the queen was empowered to appoint persons to exercise such jurisdiction and authority.

To secure a full obedience to this new establishment, an oath was devised, in which the party taking it declared that the queen was the only supreme governor of this realm, and of all other her dominions, as well in spiritual things or causes as temporal; that no foreign prince, person, prelate, state, or potentate, had, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm; that he did utterly renounce all foreign jurisdictions and authorities; and did promise to bear true allegiance to the queen.

This oath was to be taken by every ecclesiastical person, officer, and minister; by every temporal judge, justice, mayor, and other lay or temporal officer or minister; and every other person having the queen's fee or wages, under no severer penalties than disability to hold such preferments or offices. Persons, before they take orders, or a degree, are first required to take the said oath. Heavy penalties are inflicted on those who impugn the supremacy of the crown.

The next step in effecting this reformation was to revive the use of the Common Prayer and administration of

and habits of deception and concealment, out of which are certain to arise a tendency to fraud. No doubt, as Lord Coke and Lord Bacon observed, offences of the nature of fraud principally prevail in times of peace, and this long reign was for the most part one of peace; but it was also one of despotism and persecution, and habitual concealment and deception; and beyond all doubt fraud and perjury greatly increased in this reign. It was said in this reign: Because fraud and deceit abound in these days more than in former times, it was resolved that all statutes passed against fraud should be liberally and beneficially expounded to suppress the fraud (*Twyne's Case*, 3 *Coke's Reps.*, 82). In another celebrated case, Lord Coke reports the judges as observing on the increase of perjury, and they assign that as the reason for encouraging a new species of action in order to get rid of one in which, under the name of wager of law, parties were admitted to deny debts on their oaths (*Slade's Case*, 4 *Coke*). And certainly one feature in the legal history of this reign is the increase of statutes to provide remedies for fraud, some of them reciting that acts of fraud were becoming more frequent than they were. Thus there was the act against forgers of false deeds and writings, reciting that the wicked, pernicious, and dangerous practice of making and forging false charters, deeds, and writings hath of late times been very much more used in all parts of the realm than in times past (5 *Eliz.*, c. xiv.). So the act against fraudulent deeds and alienations "more commonly used in these days than hath been heard of heretofore" (13 *Eliz.*, c. v.). So as to perjury (5 *Eliz.*, c. ix.). So as to bankruptcy and outlawry, and abuse of process of arrest.

sacraments, as ordained by Edward the Sixth (*a*). This was done by stat. 1 Elizabeth, c. 2, which repealed stat.

(*a*) This was confirmed by the 13 and 14 Charles II., c. iv., which, taken in conjunction with the above act, render penal any violation of the rubrics, and any rite or ceremony, nay, even any posture, or change of posture, not contained in the rubrics. The rule upon this subject has been lately laid down by the Judicial Committee: "In the performance of the services, rites, and ceremonies ordered by the Prayer-Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted." Thus, for instance: "If the use of lighted candles in the manner complained of be a ceremony or a ceremonial act, it might be sufficient to say that it is not, nor is any ceremony in which it forms a part, among those retained in the Prayer-Book, and it must therefore be included among those that are abolished; for the Prayer-Book, in the preface, divides all ceremonies into these two classes — those which are retained are specified, whereas none are abolished specifically or by name, but it is assumed that all are abolished which are not expressly retained." So as to ornaments. It has sometimes been insisted that the use of lighted candles up to the time of the issue of the first Prayer-Book was clearly legal; that the lighted candles were in use in the church in the second year of Edward VI., and that there was nothing in the Prayer-Book of that year making it unlawful to continue them. But the court said: "All this may be conceded, but it is in reality beside the question. The rubric of our Prayer-Book might have said, those ornaments shall be retained which were lawful, or which were in use in the second year of Edward VI., and the argument as to actual use at the time, and as to the weight of the injunction of 1547, might in that case have been material. But the rubric, speaking in 1661, more than one hundred years subsequently, defined the class of ornaments to be retained by a reference, not to what was in use *de facto*, or to what was lawful in 1549, but to what was in the church by authority of parliament in that year; and it is enough that, in the parliamentary authority indicated by these words, the ornaments in question are not found to be included. There is, the court said, abundant evidence that even the posture of the celebrating minister during all the parts of the communion service was, and that for obvious reasons, deemed to be of no small importance in the changes introduced into the Prayer-Book at and after the Reformation. The various stages of the service are fenced and guarded by directions of the most minute kind as to standing and kneeling, the former attitude being prescribed even for prayers, during which a direction to kneel might have been expected. This being the proper construction of the rubric, it is clear that a clergyman, by the use of a different posture or change of posture which he has adopted during the prayer, has violated the rubric, and committed an offence within the meaning of the 13th and 14th of Charles II., cap. 4, secs. 2, 17, 24, taken in connection with the 1st of Elizabeth, cap. 2, and punishable by admonition under sec. 23 of the latter statute. It is not open to a minister of the church, or even to the Judicial Committee, as the highest ecclesiastical tribunal of appeal, to draw a distinction in acts which are a departure from or violation of the rubric, between those which are important and those which appear to be trivial. The object of a statute of uniformity is, as its preamble expresses, to produce 'an universal agreement in the public worship of Almighty God,' an object which would be wholly frustrated if each minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, to add to, or to alter any of those details." Upon this statute, clergymen who preached against the Book of Common Prayer, or refused to celebrate divine service according to it, were deposed by the Court of High Com-

1 Mary, st. 2, c. 2, an act which, the parliament says, "brought great decay of the due honor of God, and discomfort to the professors of the truth of Christ's religion." But this repeal concerned only so much of the said stat. of Philip and Mary as related to the said book; which book, with the order of service, administration of sacraments, rites, and ceremonies, with the alterations and additions made by this statute, is declared to be in full force and effect. Many penalties are enacted against those who use any other service than this, or who speak anything in derogation of it (*a*); and persons are constrained, by certain pains and censures, to attend at church.

In this manner was the reformation of religion re-established as far as laws could go, and consistently with the general inclinations of the kingdom. But there followed from this revolution much trouble and anxiety. A new set of malcontents sprung up under the name of Nonconformists, which kept the government in alarm; these were at first the Roman Catholics, and afterwards the Puritans; who were considered as equal enemies to the established church, and were the objects of many penal restrictions in the course of this reign (*b*).

The next act made upon the subject of these new ecclesiastical alterations was stat. 1 Elizabeth, c. 4, which repealed stat. 2 and 3 Philip and Mary, c. 4, and thereby re-annexed to the crown the payment of first-fruits and tenths. But all statutes before that made for the ordering and levying those dues (except only the acts for the erection of the Court of Augmentations, and first-fruits and tenths) were to remain in force. It is further declared, that vicarages not exceeding £10 per annum, and parsonages not exceeding ten marks in the king's books, shall be discharged of first-fruits. That incumbents who happen to live only one-half year, shall pay only one-fourth

mission (*Cawdrey's Case*, 5 *Coke's Reps.*, 111). In that case, the clergyman was deposed for the first offence, but nevertheless the deprivation was held legal; for that the statute, being in the affirmative, did not take away the general and ecclesiastical jurisdiction vested in the crown, and that by virtue of this, a person could be thus deprived for breach of the Act of Conformity; which was no doubt so if the whole papal jurisdiction was annexed to the crown, and if the papal supremacy was transferred to the crown.

(*a*) And by another clause in the statute, heavy penalties were imposed for merely rejecting the oath, under which Bonner was convicted (*Dyer's Reps.*, 58), *vide post*, c. xxxiv.

(*b*) As to which see the next chapter.

of the first-fruits due; those who live one year, only half; if a year and a half, three parts; and shall not be chargeable for the whole first-fruits till they have enjoyed their preferments two years.

To prevent occasions of scandal in the ministry of the reformed church, it was thought proper to put
Simony. some restraint on simoniacal practices, which had hitherto been punishable only in the ecclesiastical court by virtue of certain canons (*a*). It is therefore enacted by stat. 31 Elizabeth, c. 6, that if any person shall, by money, or agreement for money, give or procure to be given any ecclesiastical preferment, these consequences shall follow: such gift shall be void; the presentation for that time shall be forfeited to the king; the person corruptly presenting shall forfeit double the yearly value of the living; and the person presented disabled to take the benefice. A penalty is also inflicted on persons consenting for money to institute or admit any one to a living; such person is to forfeit double the yearly value of the living; the institution or admission to be void, and the patron allowed again to present. To prevent the like corrupt contracts concerning exchanges of livings, double the sum given to procure such changes is to be forfeited both by the giver and taker.

To suppress simony in its first concoction, it is moreover provided, that the giving or procuring holy orders to be given for money, or for any agreement for money,

(*a*) Simony was defined in the courts of law, in a case after this statute, to be *voluntas, sive desiderium emendi vel vendendi spiritualia vel spiritualibus adherentia* (*Cro. Eliz.*, 790). It was afterwards laid down that simony by the spiritual law, is the buying of chrisms, etc., or anything *quæ ad spiritualia spectat* (1 *Lord Raym. Reps.*, 449). But the common law took no notice of any simony (as it was a spiritual offence), unless such as was mentioned in some statute, and as the present (12 *Ibid.*, 238; *Bishop of St. David's v. Lucy*, 1 *Lord Raym. Reps.*, 449). By the canons of 1603, canon 138, it is simony to take anything for a spiritual service or benefit which the usage did not warrant, or more for visitations than the usage warranted (*Ibid.*). It was agreed by all the judges that the clergy were bound by the canons of 1603, which make simony a great offence (*Ibid.*). As to statutable simony, with reference to benefices, etc., the cases have always been numerous. It was also agreed that taking excessive fees for conferring orders, etc., was simony by the canon law, for orders ought to be free; and so, it was said, it was declared by the act of Elizabeth. And Holt said, that by the canon law, and of common right, no person ought to take anything for christening of children or burials, and but by custom they are allowed to take something (*Ibid.*).

shall induce the penalty of £40, and the party so corruptly ordained shall forfeit £10. Besides which, should he afterwards within seven years take a living, it shall immediately become void, and the patron be enabled to present afresh. All these temporal penalties are enacted without any prejudice to the jurisdiction of the spiritual court; with regard to which this act can only be considered as accumulative, by bringing before the temporal magistrate some more flagrant acts of simony.

Some very material regulations were made in this reign by parliament concerning the poor and laboring part of the nation. This great bulk of people were considered by the law in three lights; such who,^u by their education and living, were fit and habituated to work and labor, and such who were poor. These latter were of two descriptions: the one was such as lived in beggary, through wilful idleness, and were therefore looked upon, in a great degree as offenders; the other were such as were sick and impotent, and unable to provide for themselves. Under these three considerations were statutes now made, composing a body of provisions for the ordering and correction of such persons, namely, stat. 5 Elizabeth, c. 4, concerning *laborers, artificers, and apprentices*; stat. 39 Elizabeth, c. 4, concerning *rogues, vagabonds, and sturdy beggars*; and statute 43 Elizabeth, c. 2, *for the relief of the poor*.

These statutes make very full provisions for such matters as were the objects of them; and, as they were framed upon thorough consideration, and the experience of ages, that part of the community to whom they related were governed by them for many years without much alteration. The particular regulations of these statutes had either been adopted from preceding ones on the same subject, or had been suggested by the defects and evil consequences attending former laws. The former statutes relating to the poor were many; a retrospective view of them will at once discover the different ways in which this matter had been treated, and the degrees by which these regulations grew to their present size. To begin with artificers and laborers.

The first regulation concerning them is the Statute of Laborers, 23 Edward III. This act is said to have been occasioned by the late pestilence, which had carried off

many working people (a). Servants and laborers, seeing the difficulty masters were under from the scarcity of hands, would not serve without

The Statute of
Laborers.

(a) "The statute was made for the advantage of the lords, that they should not be in want of servants" (*Finchden, C. J.*, 40 *Edw. III.*, f. 40); but the necessity for it was far more permanent and general than the temporary and partial cause here suggested, and which could hardly account for the maintenance of a long series of similar enactments down to the time of the earliest poor-laws. These laws as to laborers contained in them the germ of a principle which was thence transferred to the poor-laws—the principle of fixing the poor as much as possible to the soil on which they were born, and of forcibly removing them thereto if they wandered. The origin of this principle, and its transmission in the course of legislation down to our own time, afford a striking illustration of the character of our laws. There can be no doubt that the earliest laws as to laborers or as to vagrants had reference to the state of villenage or serfdom, and the efforts of the villeins to escape from it. The earliest vagrants were villeins, and the villeins were constantly wandering away from their lords, in order to escape the bondage of forced labor, which brought no profit to themselves, for even property the result of their own labor could be seized by their lords; and hence it was not to be wondered at that they should in various ways try to escape so hard a thralldom, and that many of them should lapse into a state of vagrancy. Vagabondage, in short, grew out of villenage, and these laws arose out of vagabondage. The result of it was, that the lords found their own villeins, to whose labor they had a right, constantly lost, while they were surrounded by numbers of vagrants, most of whom, there could be little doubt, were villeins of other lords. The process of seeking for and reclaiming the villeins was troublesome and costly; and instead of it parliament passed these acts as to laborers and others as to vagrants, the effect of which was to enable the lords to put vagrants to labor as a substitute for the loss of the labor of their villeins. That this was the true origin of the statute is known by its terms, and by the cases determined upon it. Thus the statute was that, as the lord, if he found his villein, could seize him and carry him to the estate to which he was *règardant*,—i. e., attached,—so the lord should have the preferable right to the labor of his villein, *quod domini preferantur in nativis suis*; so that, in an action under the statute for taking a laborer, the defendant could plead that he was lord of a manor, and that the laborer was his villein *règardant*, or attached to the manor, and that he had need of his services (47 *Edw. III.*, f. 16). And so the villein could plead in an action under this statute that he held land of a lord of a manor to whom he owed certain services; for it was said, the statute was made for the advantage of lords, that they might not be in want of servants, and it is necessary that every lord should let part of his land for the sake of the services to be done to his manor; and if the laborer was occupied in such service, he could not be taken under the statute (40 *Edw. III.*, f. 40). The granting of a lease or a tenancy, it is to be observed, to a villein, enfranchised him (*Year-Book, Hen. VII.*, f. 11); and therefore if a man was a lessee, on the same principle he could not be taken under the statute. But the scope of the statute was, by a sort of statutable villenage, to give the lord of the soil the right to the labor of the laborers on the soil whose labor was not already lawfully appropriated either by their own land or the land of any lord or landlord; that is, the statute gave the right to the labor of vagrants (38 *Edw. III.*, f. 10). Under these statutes, if a man was found vagrant out of his county, he could be taken and put to labor, although in his own county he was villein or

excessive wages; and many refusing to work, took to begging and disorderly courses. It was therefore thought advisable that some compulsory method should be prescribed; and it was accordingly enacted, that every man and woman, able in body, and within the age of three-score, not living in merchandise, nor exercising any craft, not having of his own whereof to live, nor land about whose tillage he might employ himself, nor serving any other, such person should be bound to serve, if required, at the accustomed wages; and if he refused, was to be committed to the next jail till he found surety to be entered into service.¹ If any workman or servant departed before the term agreed, he was to be imprisoned.² None were to pay more than the old wages, upon pain of forfeiting double what they so gave;³ and if any took more, he was to be committed to jail;⁴ and such overplus wages was to be levied to the king's use, in alleviation of the dismes and quinzimes assessed on the town or district.⁵ Upon this statute many commissions were granted to make inquiry concerning the execution of it.

But this statute, not answering the end effectually, was followed by stat. 25 Edward III., s. 1, which contained many further provisions; among others, carters, ploughmen, and other servants were to serve by the whole year, or by other usual terms, and not by the day.⁶ None was to go out of the town where he dwelt in winter to serve in summer, if he could get work therein.⁷ The wages of certain artificers and of servants in husbandry were fixed by this act.⁸ And, to make sure of fair dealings, cordwainers and shoemakers were to sell at the price in 20 Edward III. And saddlers, horsesmiths, tailors, and all other servants not mentioned in the act, were to be sworn before the justices, to do and use their crafts and offices

laborer to another (*Year-Book*, 17 *Edw. IV.*, f. 8). The statute, it was said, was to be understood of laborers who were vagrants, and who were, therefore, to be made to work (*Year-Book*, 10 *Hen. VI.*, f. 8, pl. 30). And by the statutes, laborers, on the other hand, departing from their labor, could be brought back to it (47 *Edw. III.*, f. 14). Under these statutes, therefore, if a man was "found wandering about the country," he could be put to work by any one (11 *Hen. IV.*, f. 27). There was, it will be seen, a close connection between the subject of villenage and these statutes; and as villenage was dying out, the last case of it occurred at the end of this reign.

¹ Cap. 1.² Cap. 3.³ Cap. 8.⁴ Cap. 2.⁵ Cap. 2.⁶ Cap. 5.⁷ Cap. 1.⁸ Caps. 2, 3.

in the manner they were wont to do in 20 Edward III., and any breaking this statute, after such oath, was to be punished by fine and imprisonment, at discretion of the justices. If laborers or artificers left their work, and went into another county, process was to be issued to the sheriff; and if he returned *non inventus* there was to be an exigent at the first day, by stat. 34 Edward III., c. 10.

By stat. 12 Richard II., c. 3, no servant or laborer, whether man or woman, was to depart at the end of his term out of the hundred where he dwelt, to serve elsewhere, unless he brought a letter-patent (namely, a testimonial) containing the cause of his going, and time of his return, if he was to return, under the king's seal, which for this purpose was to be in the keeping of some man of the hundred; and a servant wandering without such testimonial was to be put in the stocks till he gave surety to return to his service. And he or she who used to labor at the plough and cart, or other service of husbandry, till twelve years of age, should so abide, and not be put to any other mystery.¹ By stat. 13 Richard II., c. 8, s. 1, the justices were to settle, and make known by proclamation between Easter and Michaelmas, what should be the wages of day-laborers.

Because many persons of country towns and villages bound their children apprentices to trades in cities and boroughs, "for the pride (says the statute) of clothing and other evil customs, which servants do use in the same," so that there was a scarcity of laborers in husbandry: it was enacted by stat. 7 Henry IV., c. 17, in affirmance of stat. 12 Richard II. above-mentioned, that no person should put a son or daughter apprentice within a city or borough, except he had land, or rent to the value of 20s. *per annum* at least, upon pain of a year's imprisonment. And every person offering to apprentice a child in a city or borough was obliged to bring a bill, sealed by two justices of the county, testifying the value of his land or rent.

By stat. 23 Henry VI., c. 13, a servant having agreed to serve another person next year, was directed, together with such other person, to give warning to his master, at the midst of the term, or before. After this, there is no

¹ Cap. 5.

other statute on this subject till stat. 3 and 4 Edward VI., c. 22, where it was ordained that clothmakers, fullers, shear-men, tailors, and shoemakers should not retain journeymen for less than a quarter of a year. And every one in these trades having three apprentices was to have one journeyman.

These are the principal parts of some of the many acts that had been made, and were now in force, concerning the returning, the departure, the wages of servants, laborers, and apprentices. They had been accumulating from the time of Edward III., and had now, partly from their imperfection, partly from their contrariety, as well as from their number, and the alteration of circumstances (*a*), become almost impossible to be executed without oppression or inconvenience. However, as they had all of them been beneficial at the time they were passed, it was thought that such of the substance of them as was adapted to the present times should be reduced into one statute, which should comprise some uniform regulations upon this subject. Accordingly, all former laws are repealed by stat. 5 Elizabeth, c. 4 (*b*); and by the same act, a set of rules are

(*a*) As the dying out of villenage (the last case of which occurred in this reign). In the last year, a writ of *nativo habendo* was brought, claiming the defendant as a villein, and judgment was given that he should be enfranchised forever (*Dighton v. Bartholomew*, *Yelverton's Reps.*, 2). That was a judgment by default; but if both parties had appeared, the claimant would have had to allege seisin in fee, and produce some of defendant's blood, who acknowledged himself to be a villein. It was not easy, at that time, to produce such evidence, and this was the last claim of the kind. The dying out of villenage was partly the cause and partly the result of the villeins wandering away and becoming vagrants. Hence, no doubt, a vast increase of vagabondage; and it is probable that the enormous confiscations of charities which had taken place under the acts for suppression of chantries and obits had tended still more to increase it. Hence the necessity for the statutes as to laborers and vagrants, the poor-law, and the Statute of Charitable Uses.

(*b*) These statutes as to artificers, etc., and the earliest of the statutes as to the poor, were, it is to be observed, passed in the same year of this reign (5 *Eliz.*, c. iii., iv.); and through the whole reign the subject of the poor-law was advancing and developing, quite contrary to the common notion that the parliament all at once passed, for the first time, a poor-law. The three subjects — charities, vagrants, and poor — were closely connected, and the subjects of vagrancy and mendicancy were closely connected with that of villenage, which, as shown in the notes to the reign of Edward III., was the origin of the old statutes of laborers and vagabonds, the originals of the acts of this reign as to artificers and as to vagrants. The act as to artificers deserves special attention, as the earliest instance in our history of a measure of codification, or, at all events, of consolidation; and in that respect it marks an era in the history of our statute law, for it consolidated the previous statutes on the subject, and recited that there remain, and stand in

digested for ordering these matters, which have undergone very little mutation since, and are all now in force.

The following are the provisions made by this act:

No one shall be retained for less than a year in certain trades therein mentioned, and every person, unmarried, and every married person under thirty years of age, brought up in the said trades, or having exercised them for three years, not having lands freehold or copyhold, for term of life at least, of clear 40s. per annum, nor goods to the value of £10, and so allowed by two justices of the peace, or the mayor, or head officer of the place where he last dwelt for a year, nor being retained already in husbandry, or the above trades, nor in any other; nor in service of any nobleman, gentleman, or other; nor having a farm whereon to employ himself in tillage; such person *shall serve* in the trade he has been brought up in, if required.

No person shall put away such servant, nor shall the servant depart, before the end of his term, unless for reasonable cause to be allowed before two justices, or before the mayor or other chief officer of the place; nor shall the servant depart without a quarter's warning, given either by the master or servant. Thus far of persons *compellable to serve in certain trades* (a).

Next as to *husbandry*. Every person from twelve to sixty, not being a servant lawfully retained, nor apprentice to any fisherman, or mariner, nor in service with any carrier of grain to London, nor with any husbandman, nor

force, a great number of acts concerning servants and laborers, yet, partly for their imperfection and contrariety, and partly for the variety and number of them, they cannot be put in due execution; and they were thought to be good and beneficial for the commonwealth (as divers of them are); so the substance of as many laws as are meet to be continued shall be *digested and reduced into one sole law and statute*, etc. (5 *Eliz.*, c. iv.). And then there is a long, elaborate, well-drawn statute of forty-eight clauses, a very long statute for those times, consolidating the whole law on the subject—the earliest instance of consolidation in our statute-book. It may here be mentioned that this reign was remarkable for the careful and admirable manner in which the statutes were drawn and penned, no doubt owing to this, that they were entrusted to competent persons to frame, and were then not allowed to be altered or tampered with by crude and hasty amendments, but were passed entire and intact as originally framed.

(a) Therefore, an order of a justice for discharging a servant from her master's service, under the statute 5 Elizabeth, c. iv., was held void, and not merely voidable, because it did not appear on the order itself that "she was a servant in husbandry" (*Rex v. Halcott*, 6 *T. R.*, 583).

in any city, town corporate or market town, in any trade authorized by this statute to take apprentices, nor retained yearly or half-yearly, at least, in working mines of silver, lead, tin, iron, copper, stone, sea-coal, stone-coal, moor-coal, or charcoal; nor in making glass, nor in being a gentleman born, nor student in the universities, or in any school; nor having an estate for life, at least, in lands of 40s. per annum, nor goods to the value of £10; nor having a father or mother then living, or other ancestor, whose heir-apparent he is, then having lands of £10 per annum, or goods of the value of £40; nor being a necessary and convenient servant lawfully retained, as before-mentioned; nor having a farm whereon to employ himself, nor otherwise lawfully retained according to this statute; such person, being between twelve and sixty years old, shall be compelled to serve in husbandry by the year, if required.

To enforce all which provisions, it is declared that persons so qualified, who refused to serve, or departed before the end of their term, and without a quarter's warning (unless for reasonable cause as before-mentioned), may be examined by two justices, or the mayor, or other chief officer of the place; and, upon its being proved, shall be committed to ward, without bail or mainprise, until he be bound to serve the party making the complaint. And a master putting his servant away before his term ended, without a quarter's warning, is to forfeit, in the same manner, forty shillings.

No servant retained in the above trades and husbandry shall, after his term, depart from one city, town, parish, hundred, or county, to another, unless he have a testimonial under the seal of the said town, or of the constable and of two other honest householders of the place where he last served, declaring his lawful departure (a). Nor shall he be again retained without showing such testimonial to the chief officer of a town corporate, and, in other places, to the constable, curate, churchwardens, where he is to be retained. Servants departing without such testimonial are to be imprisoned till they procure one, which they are to do within twenty-one days, or are to be treated and whipped as vagabonds. And persons retaining a servant without such testimonial are to forfeit £5. Thus

(a) It is not an indictable offence to exercise a trade in a borough, contrary to the by-laws of that borough (*Rex v. Sharples*, 4 T. R., 777).

far of *yearly servants* in husbandry and the trades above-mentioned.

Respecting *artificers and laborers*, being hired for wages *by the day or week*, certain orders are made about their times of work and rest; and as to those employed in building or repairing who take upon them to finish any work, they are not to depart, unless for not paying their wages, or by their master's license, before finishing, under pain of a month's imprisonment and forfeiture of £5.

As to the wages, whether of servants, laborers, or artificers, either working by the year, day, or otherwise, they are to be settled by the justices yearly at the Easter sessions, to be certified on parchment to the chancellor, from whence it is to be sent, before the 1st of September, and to be proclaimed on market-day, and fixed up in some open place (a). Persons giving more wages than allowed

(a) The statute, it will be observed, enacted that justices of every shire, or the mayor or other head officer of any city or corporate town, should assemble yearly, and calling unto them such discreet and grave persons as they shall think meet, and conferring together respecting the plenty or scarcity of the time, and other circumstances necessary to be considered, shall have authority to limit and appoint the wages of artificers, etc., whose wages in time past have been by any law appointed. Then the 2 James I., c. vi., recited that the act hath not, according to the true meaning thereof, been put in execution, whereby the rates of wages for poor artificers, and others whose wages were meant to be rated according to the plenty, scarcity, necessity, and respect of the time, which was politically intended by the act by reason that question had arisen, whether the rating of all manner of artificers, or workmen, other than as by some statute and law had been rated, should or might be rated by the said law, and as the said law had been found beneficial for the common wealth; and it enacted that the said statute, and the authority given by it for assessing and rating of wages, should give authority to all persons having any such authority, to rate wages of any laborers, weavers, spinsters, and workmen whatever, whether working by the day, week, or month, or year, or taking work at any person's hand to be done. The reason of passing this statute was a doubt which had been entertained whether the power of the justice extended beyond ordinary work and labor. These were the more ancient statutes on the subject, and in the construction of the more modern acts these older statutes were referred to (*Brannell v. Pennick*, 1 *Man and Pyle*, 418). In so far as these statutes attempted to regulate the rate of wages, they have long been obsolete; but so far as they were directed to enforce contracts of employment, they have been superseded by more modern statutes. Before that it would appear they had so grown into disuse that they were practically obsolete; at all events the magistrates declined to put them in force, and the Court of King's Bench refused to compel them to do so. Thus, in our own time, where the weavers presented a petition to the justices at sessions, praying them to limit a rate of wages, according to the provisions of stat. 5 Elizabeth, c. iv., s. 15, and 1 James I., c. vi., s. 3, and the justices heard the petition and counsel in support of it, and after making inquiry and examining witnesses upon the subject, determined

by the proclamation, are to be imprisoned ten days; and those taking more, twenty-one days.

A servant assaulting his master is to be imprisoned for a year, or less, by the discretion of two justices. The justices, and also the constable, upon request, may compel such artificers and persons as be meet for labor, to serve in harvest of hay or corn, in mowing and reaping; and if any refuse, he is to be put in the stocks for two days and one night.

The next provision of this act regards *women*, who between twelve and forty years of age, unmarried and out of service, may be appointed by two justices to serve by the year, week, or day, for such wages, and in such reasonable sort and manner as they shall think meet; and upon a woman's refusal so to serve, she is to be committed to ward till she consents.

The next description of servants who are regulated by this act are *apprentices*. For the advancement of husbandry, it is declared that any householder having and using half a ploughland, may have as an apprentice a person above ten and under eighteen years, till twenty-one years at least, or twenty-four. The said retainer to be by indenture.

And every householder, being twenty-four years of age, living in a city or town corporate, and exercising any art or mystery, may have the son of any freeman, not occupying husbandry, nor being a laborer, and living in that or some other city or town corporate, as an apprentice, after the custom of London, for seven years at least, so as the term do not expire before the apprentice shall be at least of twenty-four years.

As to merchants, mercers, drapers, goldsmiths, ironmongers, embroiderers, clothiers, living in a city or town corporate, these being occupations of a higher order, they are not to take any apprentice, except their own sons, or else the father and mother of such apprentice shall have lands of forty shillings per annum of an estate of freehold, at least, to be certified under the hands of three justices.

that they could not make any rate more beneficial to the weavers; the Court of King's Bench refused a mandamus to the justices to hear and determine, although they did not examine witnesses tendered by the petitioners, nor any witnesses, upon oath, or in open court (*Rex v. Cumberland Justices*, 1 M. and S., 190).

But in towns not corporate, so long as a market be weekly used there and kept, any householder of twenty-four years old, not occupying husbandry, nor being a laborer, exercising any art or mystery, may have to apprentice the child of any other artificer, not occupying husbandry, nor being a laborer, dwelling in the same or in any other market-town. However, this is not to be construed to give permission to merchants, mercers, and those just mentioned, to take apprentices in market-towns, otherwise than as before directed.

And the son of any person, though his father has no lands, may be put apprentice to a smith, wheelwright, plough-wright, millwright, carpenter, rough-mason, plasterer, and several others mentioned in the act of the like class.

And to encourage this kind of service, it is enacted that no one shall exercise any craft, mystery, or occupation, *then used*, or occupied within the realm of England or Wales, except he shall have been brought up therein seven years at least as an apprentice in manner and form above mentioned, upon pain of forfeiting forty shillings for every month he shall so do (*a*).

(*a*) The case of *Rex v. Pemberton*, 2 Burr., 1035, relates to using a trade without having served an apprenticeship, but the stat. 5 Elizabeth, c. iv., on which it was founded, is repealed. At common law, a man might practise any trade anywhere, whether or not he had been apprenticed to it, and after this statute he might go, if apprenticed, anywhere, and was not compelled to practise his trade only where he happened to have been apprenticed (*Case of the Tailors of Ipswich*, 11 Coke's Reps.). It was doubtful how far even a by-law of a corporation could exclude men from practising their trades there, unless they had been apprenticed in the particular town. Thus in that case it was alleged that a corporation was founded by charter, and afterwards the said corporation, in the same four years, made divers constitutions, and, amongst others, that no person exercising any of the said trades within the town of Ipswich foresaid, should keep any shop or chamber, or exercise the said faculties, or any of them, or take an apprentice or journeyman, till he had presented himself to the master and warders of the said society for the time being, or some three of them, and should prove that he had served seven years, at the least, as an apprentice, and before he should be admitted by them to be a sufficient workman; and if any should offend in any part thereof, that he should forfeit and pay to the said masters, warders, and society aforesaid, for every such offence, five marks, and to levy it by way of distress, or by action of debt, etc., which (amongst others) was allowed by the justices of assize of the same county, according to the said act of 19 Henry VII. And in this case, upon argument at the bar and bench, divers points were resolved: 1. That at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, *otium omnium vitiorum mater*, and especially in young men, who

None shall be apprentice to a woollen-cloth weaver, unless his own son, or the son of one who has land of £3 per

ought in their youth (which is their seed-time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age; for, idle in youth, poor in age; and therefore the common law abhors all monopolies which prohibit any from working in any lawful trade, and that appears in 2 Henry V., 5 b. A dyer was bound that he should not use the dyer's craft for two years; and there Hull held that the bond was against the common law; and by G—d, if the plaintiff was there, he should go to prison till he paid a fine to the king: so, and for the same reason, if an husbandman is bound that he shall not sow his land, the bond is against the common law; and *vide* 7 Edward III., 6, 5 b.; and if he who takes upon him to work is unskilful, his ignorance. And if any one takes upon him to work, and spoils it, an action on the case lies against him. And the statute of 5 Elizabeth, iv., which prohibits every person from using or exercising any craft, mystery, or occupation unless he has been an apprentice by the space of seven years, was not enacted only to the intent that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades; and thereby it appears that, without an act of parliament, none can be in any manner restrained from working in any lawful trade; also the common law doth not prohibit any person from using several arts or mysteries at his pleasure. *Nemo prohibetur plures negotiationes five artes exercere*, until it was prohibited by act of parliament of 37 Edward III., c. 6, *scil.*, that the artificers and people of mystery hold themselves every one to one mystery, and that none use other mystery than that which he has chosen; but this restraint of trade and traffic was immediately found prejudicial to the commonwealth, and therefore, at the next parliament, it was enacted that all people should be as free as they were at any time before the said ordinance; that the said restraint of the defendant, for more than the said act of 5 Elizabeth has made, was against law; and therefore, forasmuch as the statute has not restrained him who has served as an apprentice for seven years from exercising the trade of a tailor, the said ordinance cannot prohibit him from exercising his trade till he has presented himself before them, or till they allow him to be a workman; for these are against the liberty and freedom of the subject, and are a means of extortion in drawing money from them, either by delay or some other subtile device, or of oppression of young tradesmen by the old and rich of the same trade not permitting them to work in their trade freely; and all this is against the common law and the commonwealth; but ordinances for the good order and government of men of trades and mysteries are good, but not to restrain any one in his lawful mystery. It was resolved, that the said branch of the act of 5 Elizabeth is intended of a public use and exercise of a trade to all who will come, and not of him who is a private cook, tailor, brewer, baker, etc., in the house of any for the use of a family; and therefore if the said ordinance has been good and consonant to law, such a private exercise and use has not been within it; for every one may work in such a private manner, although he has never been an apprentice in the trade. In the case of *Monopolies* (11 *Coke's Reps.*, 86), it was resolved, *per totam curiam*, that the grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons: 1. That it is a monopoly, and against the common law; 2. That it is against divers acts of parliaments. Against the common law, for four reasons: (1.) All trades, as well mechanical, as others, which prevent idleness (the bane of the commonwealth), and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their sub-

annum of freehold estate at least, signified by the seals of three justices; and the effect of the indenture is to be

stance, to serve the queen when occasion shall require, are profitable for the commonwealth; and therefore the grant to the plaintiff to have the sole making of them, is against the common law and the benefit and liberty of the subject, and therewith agrees (*Fortescue in laudibus legum Angliæ*, c. xxvi.); and a case was adjudged in this court in an action of trespass, *inter Davenam v. Hurdis*, Trin. 41 Elizabeth, Rot. 92, where the case was, that the Company of Merchant Tailors in London, having power by charter to make ordinances for the better rule and government of the company, so that they are consonant to law and reason, made an ordinance, that every brother of the same society who should put any cloth to be dressed by any cloth-worker, not being a brother of the same society, should put one-half of his cloths to some brother of the same society who exercised the art of a cloth-worker, upon pain of forfeiting 10s., etc., and to distrain for it, etc.; and it was adjudged that that ordinance, although it had the countenance of a charter, was against the common law, because it was against the liberty of the subject; for every subject by the law has freedom and liberty to put cloth to be dressed by what cloth-worker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly, and therefore such ordinance by color of a charter, or any grant by charter to such effect, would be void. The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees, and all the provisions and cautions are added to moderate them, yet *res stulta est nequitie modus*. It is mere folly to think that there is any measure in mischief or wickedness; and therefore there are three inseparable incidents to every monopoly against the commonwealth: 1. That the price of the same commodity will be raised; for A, who has the sole selling of any commodity, may and will make the price as he pleases. 2. The second incident to a monopoly is, that after the monopoly granted, the commodity is not so good and merchantable as it was before; for the patentee, having the sole trade, regards only in private benefit, and not the commonwealth. 3. It tends to the impoverishment of divers artificers and others, who before by the labor of their hands in their art or trade had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary (*vide, Fortescue ubi supra*). And the common law in this point agrees with the equity of the law of God, that every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life. (2.) This grant is *prime impressionis*, for no such was ever seen to pass by letters-patent under the great seal before these days, and therefore it is a dangerous innovation, as well without any precedent or example as without authority of law or reason. And it was observed that this grant to the plaintiff was for twelve years, so that his executors, administrators, wife, or children, or others inexperienced in the art and trade, will have this monopoly. And therefore it was resolved that the queen could not suppress the making of cards within the realm, no more than the making of dice, bowls, balls, hawks, hoods, bells, lures, dog-couples, and others the like, which are works of labor and art, although they serve for pleasure, recreation, and pastime, and cannot be suppressed but by parliament, nor a man restrained from exercising any trade but by parliament. And as men worked at cardmaking with the labor of their hands, now for a private gain, to grant the sole importation of them to one or diverse (without any limitation), notwithstanding the said act, is a monopoly against the common law, and against the end and scope of the act itself, for this is not to maintain and increase the labors

registered within three months in the parish where the master dwells, upon pain of forty shillings for every month that a person shall take an apprentice otherwise.¹

Every clothmaker, fuller, shearman, weaver, tailor, or

of the poor card-makers within the realm, at whose petition the act was made, but utterly to take away and destroy their trade and labors, and that without any reason of necessity or inconveniency in respect of person, place, or time, and *eo potius*, because it was granted in reversion for years, as hath been said, but only for the benefit of a private man, his executors, and administrators for his particular commodity, and in prejudice of the commonwealth. It was held upon this statute that it did not extend to every trade, but only such as required art and skill, and therefore not to a hemp-dresser (1 *Cro.*, 2 *Bulstr.*, 188), nor a pepper-monger (1 *Roll.*, 10), or a gardener, nor a baker or brewer, nor, it should seem, a fruiterer (*The King v. Plume*, 1 *Vent.*, 326). But a barber, upholsterer, and coachmaker, were held to be within the act (*Ibid.*, 1 *Vent.*, 346). It was doubtful whether a grocer's trade was within the act (*Anon.*, 1 *Vent.*, 142). It was held also that to keep a shop in a country village was not within the statute, and it was very inconvenient that the inhabitants must go to some great town upon every occasion (*Anon.*, 1 *Vent.*, 51); and indictments for the offence were quashed or held bad on the most trifling exceptions (*Ibid.*), so it soon became obsolete. It was a question, after these statutes, whether a new corporation, without a special prescription, could make a law to exclude all persons to use an art or trade in their town, whereunto they were not apprentices within the town, though they served their apprentice-bonds to it elsewhere (*Norris v. Staps*, *Hobart's Reps.*, 10), wherein it was said by Hobart, C. J., the question was between the particular privileges of forms and the general liberties of the people. It was said by the same learned judge, that up to that time it had never been so decided, and that the law, as it then stood, forbade no man to exercise a trade even publicly, that had been an apprentice to it (*Case of the Tailors of Ipswich*, 11 *Coke's Reps.*, 53). "The simple incorporation of a town doth not draw by consequence a peculiar trading to that town, with an exclusion of foreigners, for it must be a special law or ordinance that must work that effect" (*Hobart C. J.*, *Norris v. Staps*, *Hobart's Reps.*, 211). And that learned judge evidently held it doubtful whether even a by-law to that effect approved by the chancellor, under the act 19 Henry VII., would be valid. It is conceived that it would be clearly invalid as a restraint of trade (11 *Coke's Reps.*, 84). The common law did not forbid any man to exercise any trade, whether he were or were not trained in it, or to exercise more trades than one. But if any man professing a public trade, would perform it falsely or insufficiently, he was answerable, *i. e.*, to action at the suit of the party injured (*Hobart C. J.*, *Norris v. Staps*, *Hobart's Reps.*, 211). And the law, even under these statutes, did not forbid any man to use any trade privately, as to be a tailor in any house, or the like, for that is not a trade, but a service, that was at the employer's peril, whether it were well or ill done (*Ibid.*). And further, the law under these statutes was never held to exclude a man to exercise a trade publicly that had been an apprentice to it anywhere (*Case of the Tailors of Ipswich*, 11 *Coke's Reps.*, 53). The objects of these statutes as to apprentices was no doubt to secure that men did not practise trades in which they were unskilled, and that was a highly salutary object, preserved in all the professions, and carried out by force of law. There does not appear any objection to such legislation in point of principle. But these statutes have long been disused.

¹ Repealed by stat. 5 and 6 William and Mary, c. 9.

shoemaker, having three apprentices, shall have one journeyman; and for every apprentice above three, one journeyman.

Any person required by a householder, having and using a plough-land at least in tillage, to become an apprentice, in husbandry, or any other occupation, and if he should refuse, may, upon complaint to a justice, or the mayor, or chief officer of the place, be sent for; and if it appears that he is a proper person, he shall be committed to ward till he consents. And where such master or apprentice have cause of complaint against each other, they shall repair to a justice, or mayor, or chief officer, who shall determine it (a); and if the master will not agree, and compound the matter, he shall be bound in a bond to appear at the next sessions for the county, city, town corporate, or market-town; when, upon hearing the matter, the justices, or four of them at the least, or the mayor, or other head officer, with the assent of three other of his brethren, or men of best reputation within the said city, town corporate, or market-town, if they think meet to discharge

(a) The 20 George II., c. 19, and 31 George II., c. 11, enacts that all complaints, differences, and disputes, which shall happen between masters and servants in husbandry, or between masters and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other laborers, employed for any certain time, or in any other manner, shall be heard and determined by one or more justices of the peace of the place where the master shall inhabit, who are empowered to examine the parties upon oath, and to make such order for the payment of wages to the servant or laborer as to them shall seem just, not exceeding £10 as to servants, and £5 as to laborers. And the justices upon complaint or oath of any master, touching any misconduct, or miscarriage, or ill-behavior in such servant's employment may hear and determine the same, and punish the offender by commitment to the house of correction. And 4 George IV., c. 34, authorized the justices in such cases to direct payment of the wages within any time. The stat. 20 George II., c. 19, giving to magistrates jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, trotters, etc., "and other laborers," employed for any certain time, "or in any other manner," respecting wages within certain sums, extended to laborers of all descriptions, and not merely in the particular trades or businesses there enumerated (*Lowther v. Radnor (Earl)*, 8 East, 113). These statutes, however, except so far as they are connected with the excise, have gone into disuse, and are said to interfere with the freedom of trade; but as no similar objection is allowed to be valid as to the excise acts, it appears to be implied that freedom of trade may be interfered with for purposes of taxation, but not for purposes of protection. In other words, that freedom of trade implies freedom to cheat, and to impose upon the public by false wares or adulterated articles. It is conceived, on the contrary, that these statutes were founded upon the true principle as to freedom of trade, and that the objection is illusory.

the apprentice, shall have power, in writing under their hands and seals, to pronounce and declare that they have discharged the said apprentice of his apprenticeship, and the cause thereof. But if the default shall be found in the apprentice, then the justices, or mayor, or chief officer, with the assistance aforesaid, may cause due correction and punishment to be administered to him.

None but those under twenty-one years are to be bound apprentice; and all indentures, covenants, and bargains for taking or keeping an apprentice, otherwise than is limited by this statute, is void; and every person so retaining an apprentice shall forfeit £10. And to remove a doubt whether such indenture, executed by an apprentice under age, was good anywhere but in the city of London, they are declared legal and valid.

This is the substance of this statute: which though wholly in force, and parts of it completely observed at this day, is in many of its directions entirely disregarded (a). The alterations of times, which rendered the old statutes of laborers useless and inconvenient, have brought this a good deal into the same predicament; many of the requisites of this act become unnecessary and absurd in the present state of things, which no doubt at the time were founded in good policy.

We shall next consider the stat. 39 Elizabeth, c. 4, concerning *vagabonds*; but before that we shall pursue the method observed in the subject we have just dismissed, and take a cursory view of former laws concerning vagabonds and rogues.

Of vagrants.

(a) So for a long series of similar statutes. Thus searchers of leather (appointed under stat. 1 James I., c. 22) were authorized to seize leather insufficiently dried, in order to carry it before other officers called triers. This statute was carried out by others (13 and 14 Chas. II., c. 7, 1 Will. and Mary, c. 33). So by 39 Elizabeth, c. 20, searchers of cloth could seize engines used to treat cloths unfairly, and similar statutes were passed in the reigns of Anne and George I. (10 Anne, c. 16, 1 Geo. I., c. 17). So as to harness, etc. (1 James I., c. 22). The principle of searching places where carried on, was applied to brewers, etc., under the excise laws (15 Chas. II., c. 11). But the scope of the above-mentioned acts was protection of the public from improper commodities. These statutes were some of them enforced in our own time (Warne v. Wosley, 6, T. R., 444). Thus, if a person carrying on within a borough one of the trades mentioned in the statute of seience, viz., that of a cutter and worker of leather, exposed to sale shoes manufactured without the borough, and purchased by him ready made, the searchers might seize them, if made of leather insufficiently tanned (Hodgson v. Rickard, 2 N. R., 389).

There is a chapter in the Statute of Laborers, 23 Edward III., that may be considered as the first law against vagabonds. It is there said¹ that "because many valiant beggars, as long as they can live of begging, refuse to work, giving themselves to idleness, and vice, and sometimes to theft, and other abominations," it should be enacted, that none, under pain of imprisonment, should give anything to such which may labor so that they may thereby be compelled to labor for their living. By stat. 12 Richard II., c. 7, every person that goeth begging, and is able to serve or labor, shall be treated as one that goeth out of the hundred without a testimonial, which punishment has been mentioned where we spoke of laborers. After these there was no statute on this subject till 11 Henry VII., c. 2, when it was directed that vagabonds, idle and suspected persons, should be set in the stocks three days and three nights, be sustained only on bread and water, and then put out of the town, with a forfeiture of one shilling on those who give them more. Vagabonds were punished by stat. 19 Henry VII., c. 12. By stat. 22 Henry VIII., c. 12, a vagabond taken begging was to be whipped, and then sworn to return to the place where he was born or last dwelt, by the space of three years, and there to put himself to labor. Again, by stat. 27 Henry VIII., c. 25, all governors of shires, cities, towns, hundreds, hamlets, and parishes, were to compel every sturdy vagabond to be kept in continual labor. And further, a valiant beggar, or sturdy vagabond, was at the first time to be whipped, and sent to the place where he was born, or last dwelt, by the space of three years, there to get his living; and if he continued his roguish life, he was to have the upper part of the gristle of his right ear cut off; and if after that he was taken wandering in idleness, or did not apply to his labor, or was not in service with anybody, he was to be adjudged and executed as a felon.

The next statute was, perhaps, still more severe: this was stat. 1 Edward VI., c. 3, which repealed all former laws of this kind; and reciting, that the multitude of people given to idleness and vagabondry was more in number (as it may appear) in this realm than in any

¹ Cap. 7.

other region, enacted such severe punishments for this offence, as, it was thought, would surely suppress it in future. By this act any runagate servant, or any other that lived idly and loiteringly, by the space of three days, being brought before two justices, was to be marked with a hot iron on the breast, with the mark of V, and should be adjudged a slave for two years to the person who brought him, to be fed on bread, water, and small drink, and refuse meat; and to be made work by beating, chaining, or otherwise, be the work or labor ever so vile. If such slave absented himself for fourteen days during that term, he was to be marked on the forehead or ball of the cheek with a hot iron, with the sign of an S, and further to be adjudged a slave forever; and if he run away a second time, to be adjudged a felon.

But as much of this statute as made vagabonds slaves was soon repealed by stat. 3 and 4 Edward VI., c. 16, and stat. 22 Henry VIII., c. 12, was revived, all others still continuing repealed. It was moreover provided, that laborers in husbandry that were idle and loitered when reasonable wages were offered them, should be punished as vagabonds: which stat. 22 Henry VIII., c. 12, and 3 and 4 Edward VI., c. 16, were confirmed by stat. 5 and 6 Edward VI., c. 2, and afterwards by stat. 5 Elizabeth, c. 3.

But all these first three statutes were repealed by stat. 14 Elizabeth, c. 5; and by the same act it was ordained, that a vagabond above the age of fourteen should be adjudged to be grievously whipped, and burnt through the gristle of the right ear with a hot iron of the compass of an inch, unless some creditable person would take him into his service for a year. And if being of the age of eighteen, he did after fall into a roguish life, he was to suffer death as a felon, unless some creditable person would take him into his service for two years. By stat. 18 Elizabeth, c. 3, a rogue was to be conveyed from constable to constable till he came to the gaol. Which two statutes were repealed by stat. 35 Elizabeth, c. 5, s. 24, after which there was no act in force against these offenders till stat. 39 Elizabeth, c. 4, was made. This act repeals all statutes concerning punishment of vagabonds, and the erection and maintenance of houses of correction, and enacts, that the justices in quarter-sessions shall set down order for erecting one or more houses of correction within their

county or city; who are also to make orders for raising money to build and maintain such houses, and for governing the same, and punishing offenders committed thither.

Respecting the description and character of persons who are to be considered as the object of this act, they are thus set forth by this statute: All persons calling themselves scholars, going about begging; all seafaring men, pretending losses of their ships, or goods on the sea, going about begging; all idle persons going about the country, either begging or using any subtle craft, or unlawful games and plays, or feigning themselves to have knowledge in physiognomy, palmistry, or other like crafty science, or pretending that they can tell destinies, fortunes, or such other fantastical imaginations; all persons that are or utter themselves to be proctors, procurers, patent-gatherers, or collectors for gaols, prisons, or hospitals; all fencers, bearwards, common players of interludes and minstrels, wandering abroad, other than players of interludes belonging to any baron of the realm, or any other honorable personage of greater degree, to be authorized to play under the hand and seal of arms of such baron or personage; all jugglers, tinkers, pedlers, and petty chapmen wandering abroad; all wandering persons and common laborers, being persons able in body, using loitering, and refusing to work for such reasonable wages as are taxed or commonly given, not having whereof otherwise to maintain themselves; all persons delivered out of gaol, who beg for their fees, or otherwise travel begging; all persons who shall wander abroad begging, pretending losses by fire or otherwise; and all such persons not being felons,¹ wandering and pretending themselves to be Egyptians, or wandering in the habit, form, or attire of counterfeiting Egyptians; all the above-mentioned persons are to be deemed rogues, vagabonds, and sturdy beggars.

Any such person taken vagrant shall, by the appointment of any justice, constable, headborough, or tything-man (the tything-man or headborough being assisted therein with the advice of the minister and another of the parish), be stripped naked from the middle upwards, and be openly whipped till he is bloody, and shall then

¹ Namely, according to a late act, 5 Eliz., c. 20.

be sent from parish to parish by the officers of the same, till he come to the parish where he was born; if that is not known, to the parish where he dwelt for a year last before his punishment; and if that is not known, to that parish where he last passed without punishment. He is to have a testimonial of the day and place of his punishment, and of the place whereunto he is to go, and by what time he is limited to pass thither; and in whatever place he shall be found loitering and making default he shall be whipped; and so on, till he repairs to the appointed place. And the vagrant so whipped, and neither the place of his birth nor abode for a year being known, shall, by the officers of the village where he last passed through without punishment, be conveyed to the house of correction, or to the common gaol of the county or place, there to be employed in work till placed in some service, and so to continue for a year.

If any of such rogues shall appear to be dangerous to the inferior sort of people, or not likely to be reformed, two justices may commit him to the house of correction or gaol till next quarter-sessions, and then, if thought fit, he may by the justices there be banished out of the realm, to such place as shall be appointed by the Privy Council, or by six or more of them, whereof the chancellor or lord treasurer to be one; or otherwise perpetually to the galleys of this realm. And any banished rogue returning, shall be deemed a felon. There are penalties on the constable and tything-man neglecting their duty, on those who obstruct the execution of the act, and on those who bring in by sea any vagrants from Ireland, Scotland, and the Isle of Man.

There are two sorts of travellers excepted, who might otherwise come within the penalties of this act; the first are persons diseased and poor, going to the baths of Buxton and Bath, being licensed by two justices of the place where they dwelt. These persons, having wherewith to provide themselves, and not begging, are protected in going, returning, and their residence there, if they observe the limits of time and place prescribed by the license.

The other are seafaring men suffering shipwreck, and not having wherewith to relieve themselves in their travelling homeward. Such a person, having a testimonial from one justice of or near the place where he landed, testifying

the place whence he came, the place of his birth, whither he goes, and limiting the time for his passing, may ask and receive relief, so long as he goes directly on, and observes the time fixed in his testimonial. This act continued in force for some years,¹ and when repealed,² served as a foundation and model for future acts.

The next consideration regards such *poor* persons as do not come within the above character, but are
Of the poor.
impotent, and unable to maintain themselves.

The number of poor of the former description, as well as of this, had very visibly increased, or at least the burden of them had been more felt, since the dissolution of the religious houses. These, from the nature of their institution, were under an obligation to make *some* provision for the poor, and they were particularly bound to this duty, in virtue of the revenues they derived from impropriations. In the early times of our ecclesiastical establishment, the bishop used to allot a certain portion of tithes for the maintenance of the poor; and in later times the incumbent of a parish church was to assign a third of his annual income for maintenance of the poor and support of hospitality.³ This was secured by a legislative sanction; for stat. 12 Richard II., c. 6, requires that in every license of impropriation of any parish church to be made in the Chancery, it should be expressed that the diocesan shall ordain, according to the value of such church, a convenient sum of money, to be paid and distributed yearly, of the fruits and profits thereof to the poor. This relief seems to have been designed for poor in general, without any distinction in the objects.

However, this was not all the reliance the poor had for support; occasional provisions were made by the legislature for this purpose, which, however, afforded relief only to such as more particularly stood in need of it, the impotent and sick. A view of the statutes made on this head will show as well the progress made towards a compulsory method of raising a regular maintenance, as the local title by which poor persons might claim this support, which has since been called a *settlement*.

The first of these statutes is 12 Richard II., c. 7, which ordained that beggars, impotent to serve, should abide in

¹ Altered by 1 James, c. 7 and 25.

² Ken. Imp., 14, 15.

³ Repealed by 12 Anne, stat. 2, c. 23.

the cities and towns where they were dwelling at the time of the proclamation of that statute; and if the people of such places would not or could not maintain them, then they were to go to other towns within the hundred, or to the towns where they were born, within forty days after the proclamation made, and there to abide during their lives. By stat. 11 Henry VII., c. 2, every beggar not able to work was to resort to the hundred where he last dwelt, is best known, or was born, and there remain, upon pain of being put in the stocks three days and three nights, fed on bread and water, and put out of the town as a vagabond. Next follows stat. 19 Henry VII., c. 12, and stat. 22 Henry VIII., c. 12. By the former the poor were restrained from begging at large, and were confined to beg within certain districts. By the latter, the several hundreds, towns corporate, parishes, hamlets, or other like divisions, were required to sustain the impotent poor with such charitable and voluntary alms as that none of them might be compelled of necessity to go openly in begging. By stat. 27 Henry VIII., c. 25, the churchwardens, or other substantial inhabitants, were to make collections for them with boxes, on Sundays and otherwise, by their discretions; and the minister was to take all opportunities to exhort and stir up the people to be liberal and bountiful.

Next to these is stat. 1 Edward VI., c. 3, which directed that houses should be provided for the poor by the devotion of good people, and materials be provided to set them on such work as they were able to perform; and the ministers of the gospel, every Sunday, were specially to exhort the parishioners to a liberal contribution. Again, by stat. 5 and 6 Edward VI., c. 2, the collectors for the poor on a certain Sunday, immediately after divine service, were to take down in writing what every person was willing to give weekly for the ensuing year. And if any should be obstinate, and refuse to give, the minister was gently to exhort him. If still he refused, the minister was to certify such refusal to the bishop of the diocese, and the bishop was to exhort him in the same manner; and if he still stood out, the bishop was to certify the same to the justices in sessions, and bind him over to appear there.

At length, stat. 5 Elizabeth, c. 3, ordained that the poor and impotent persons of every parish should be relieved of that which every one of their charity would give weekly;

and the same relief was to be gathered in every parish by collectors assigned, and weekly distributed to the poor, for none of them were openly to go or sit begging. And if any parishioner should obstinately refuse to pay reasonably towards the relief of the poor, or discourage others, then the justices of peace at the quarter-sessions might tax him to a reasonable weekly sum, which, if he refused to pay, they might commit him to prison. And if any parish had in it more impotent poor persons than they were able to relieve, the justices might license as many of them as they thought proper to beg in one or more hundreds of the same county. And poor persons begging in any other place than where they were licensed were to be punished as vagabonds. This led to the taxation of every parishioner, by stat. 14 Elizabeth, c. 5. Then came stat. 18 Elizabeth, c. 3, which directs a stock to be provided to set the poor on work in every city and town corporate; for which purpose, and maintaining house of correction, lands in socage may be given for twenty years. This led to the more complete establishment made by stat. 39 Elizabeth, c. 3 (a), which last act was suffered to expire, and leave room for the legislature to renew its endeavors to put the relief of the poor upon a permanent foundation in some new law. This they did in stat. 43 Elizabeth, c. 2, which was an improvement and enlargement of stat. 39 Elizabeth, c. 3; this temporary statute may therefore be passed over without any remark upon it, while we examine the contents of the stat. 43 Elizabeth, c. 2, which has been in force ever since.

This act directs that the churchwardens, and four, three, or two substantial householders, as shall be thought meet, according to the size of the parish, to be nominated yearly

(a) By the 39 Elizabeth, vagrants might be removed to the places of their birth. Under this it was held that if a man were settled, and became a vagrant, he did not thereby lose his settlement; for if he were found a vagrant within 39 Elizabeth, c. 24, he might be sent to the place of his birth; but then, by 43 Elizabeth, c. ii., he might be sent from thence, as a poor person, to the place of his last legal settlement; for his being sent to the place of his birth satisfied the statute of 39 Elizabeth, and so both statutes were satisfied (*Anon.*, 2 *Salk.*, 526). From this it would seem that under 39 and 43 Elizabeth parties might be removed. The statute 14 Charles II. provided that within forty days' residence a person might be removed, but by implication not afterwards; and under that act the justices might make orders of removal (1 *Salk.*, 406; 2 *Salk.*, 417); under that act in effect a person gained a settlement, as it was called, by forty days' residence; and the 3 and 4 William III., c. xi., and 8 and 9 William III., c. xxx., turned the forty days' service into a year (2 *Salk.*, 534).

in Easter week, or within one month after Easter, under the hand and seal of two or more justices dwelling in or near the parish, shall be overseers of the poor of the parish. And they, or the greater part of them, shall take order from time to time, with the consent of two or more justices, for setting to work the children of all such parents, who shall not be thought by the said churchwardens and overseers, or the greater part of them, able to keep and maintain them, and also for setting to work all persons, married or unmarried, having no means to maintain them, and using no trade of life to get their living. For which end they are to raise weekly, or otherwise (by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, appropriation of tithes, coal-mines, or salable underwood in the parish, in such competent sum as they shall think fit), a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff, to set the poor on work; and also competent sums of money towards the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work; and also for putting out of such children apprentice, to be gathered out of the same parish, according to its ability, and to execute and dispose everything respecting the said stock and poor (*a*).

These churchwardens and overseers are to meet at least once a month in the parish church on Sunday afternoon, after divine service, there to consult what course or order they are to make respecting the discharge of this trust. They are, within four days after the end of the year, and after other overseers appointed, to make to such two justices a true account of all sums raised, expended, and in hand, and also of the stock, and deliver what is in hand to the new overseers.

If the two justices perceive that the inhabitants of any parish are not able to levy among themselves sufficient

(*a*) Upon this it was held, in the next reign, that only the occupiers of land in, and inhabitants of, the parish ought to be taxed, having regard only to the estates, real or personal, which they held there, and not elsewhere; and lessors were not to be taxed for their rents, if they were not inhabitants there, and their rents arose not there. This was held by all the judges of England. The reason given was, that the inhabitants only, *i. e.*, the parishioners, were to be taxed by the statute, not the lessors having lands elsewhere. The parishioners, it was said, could not by intendment of law have knowledge of estates in other parishes (*Jenkins*, 327; *Offrey's Case*, 3 *Coke*, 64).

sums of money, they may tax, rate, and assess any other of other parishes, or out of any parish within the same hundred, as they think fit. If they think the hundred not able, then the justices in quarter-sessions shall rate and assess any other of other parishes, or out of any parish within the county.

The overseers are to levy all such sums assessed by distress and sale of the offender's goods, under warrant from two justices, if any refuse to contribute; and in default of distress, two justices may commit him to the county gaol until payment, as they may such who refuse to work, and the overseers who refuse to account. The overseers may, by the assent of two justices, bind such children as above-mentioned to be apprentices: till twenty-four years of age, if a man child; and if a woman till twenty-one, or marriage. The overseers, under an order of quarter-sessions, may agree for building convenient houses on wastes or commons at the expense of the parish, hundred, or county.

To prevent parishes being burdened with unnecessary charges of the poor, it is provided, that the father and grandfather, mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person, not able to work, being of sufficient ability, shall relieve and maintain, at their own charges, every such poor person, according to the rate at which he shall be assessed by the justices of the county where he lives (a).

(a) By the 13 and 14 Charles II., c. xii., it was enacted that persons coming to settle in a parish, and renting a tenement under £10 a year, might be removed within forty days; but it was provided that poor persons might go into another parish by certificates; and by 3 and 4 William and Mary, c. xi., it was provided that persons coming into a parish, executing public offices, or paying towards rates and taxes; and unmarried servants, hired for a year, or persons bound apprentices in a parish, should be deemed to have acquired settlements there. And by 8 and 9 William III., c. 30, it was enacted that poor persons chargeable might be removed into other parishes by certificates from the churchwardens and overseers, attested by witnesses, and subscribed by justices, owning them parishioners at the place whence they remove, and promising to remove them when chargeable. And by 9 and 10 William III., c. 11, it was provided that persons coming into any parish by certificate should not obtain a settlement there without taking a lease of a tenement, or legally holding and executing some public office. This legislation was confirmed by the act 12 Anne, c. 18. When they became chargeable (1 *Str.*, 77; 2 *Salk.*, 530) a vagrant could be sent to the place of his birth, and from thence, by order, to the place of his settlement (*Anon.*, 2 *Salk.*, 526). It was enough if it appeared that the person was likely to be chargeable (2 *Str.*, 698; 1 *Str.*, 142). There can be little doubt that these provisions were imported into the poor-law from the old statutes as to va-

These are the principal provisions of this famous statute for the relief of the poor, which is not only still in force, but in daily use, being that upon which every parochial establishment for this purpose is founded.

While these schemes were forming for the relief of the poor in general, some charitable institutions were countenanced by the legislature, which, Hospitals. though more partial and confined in their views, contributed to promote the end at that time so much desired. Of this kind were Christ's, St. Bartholomew's, St. Thomas', and Bridewell Hospitals, founded by Edward VI. To show favor to donations for such benevolent purposes as these, it was enacted by stat. 14 Elizabeth, c. 14, that all gifts by will or otherwise to hospitals then in being shall be good, notwithstanding any misnaming of the corporation. With the same design was made stat. 18 Elizabeth, c. 3, which allowed lands holden in socage to be given during twenty years for the maintenance of houses of correction, and stocks for the poor. But this law not having all the good effect expected from it, principally because the charges of incorporation lay heavy upon the founders, and swallowed up much of the intended donation, it was therefore enacted by stat. 39 Elizabeth, c. 5, that all persons seized in fee-simple should have power during the twenty years next ensuing, by deed enrolled in the Court of Chancery, to erect, found, and establish any hospitals, maisons de Dieu, abiding-places, or houses of correction,

grants, already alluded to, and these again, it has been shown, were closely connected with the state of villenage, under which the lord could seize his villein born upon his estate wherever he could find him, and forcibly remove him to his estate. Thus the law of removal may be said to have been derived, though indirectly, from the ancient law of villenage. The statutes as to vagrants said that a man, if he wandered about idle, should be taken back to the place of his birth, and that principle was adopted into the poor-law. Under these statutes, justices could make order of removal (1 *Salk.*, 406; 2 *Salk.*, 427); and whereas by the 13 Charles II. a poor person gained a settlement by forty days' residence, under the acts of William III., a living for a year was required (2 *Salk.*, 544). It is curious to observe that this was the period of residence required by the law of the Conqueror to enfranchise a villein (vol. i., c. ii.). An apprentice, however, living forty days in a place after being bound, gained a settlement (1 *Stra.*, 479; 1 *Eliz.*, 444; 1 *Stra.*, 265). A year's living and service gave a settlement (2 *Stra.*, 459), or service for a year under a living for a year, if approved (2 *Stra.*, 950). A hired servant was settled where the service was (2 *Stra.*, 794). There must be a living and service for a year to gain a settlement (1 *Wils.*, 307; 1 *Stra.*, 143; 2 *Lord Raym.*, 1511). Subject to these statutable rights of settlement, poor persons were liable to removal.

at his will and pleasure, as well for the relief of the maimed, poor, needy, or impotent, as to set the poor to work. And that such hospitals or houses should be incorporated, and have succession forever of such head, members, and number of people, as should be appointed by the founder in such deed enrolled; and should take, hold, and enjoy lands and tenements, goods and chattels, so that the same exceeded not £200 per annum, notwithstanding the Statute of Mortmain; to be visited by such as the founder should appoint. And to prevent the dilapidation of such foundations, the like caution was taken as had before been respecting the leases of ecclesiastical persons and colleges. It was enacted that any conveyance made by such incorporated hospital exceeding twenty-one years, and that not in possession, and whereon the accustomed yearly rent or more, by the greater part of twenty years next before the lease made, was not reserved, should be void. This license for twenty years was, by a statute made in the next reign, extended to perpetuity.¹

These statutes, made for the benefit of the needy and impotent, were very properly followed by one passed in the last year of this reign: this is *the Statute of Charitable Uses*, as it is called (a), the design

Statute of Charitable Uses.

(a) This was the celebrated Statute of Charitable Uses, which has always been considered as a model, and was drawn by Sir Francis Moore, an able and competent lawyer, and passed as he framed it. So of the poor law, which remained in operation, as the main and principal law upon the subject, until our own time. It was well drawn, as were most of the statutes of this reign. It has already been shown in the introductory note to this chapter that there was a close connection between the subject of charitable uses and the relief of the poor, and that the acts on both subjects were passed the same year, and are indeed chapters in the same statute (43 *Eliz.*, c. ii. and c. iv.). The law, it will be seen, recognized the relief of the poor as a charitable use, and the previous statutes as to the poor had proceeded upon the basis of voluntary and charitable contributions. It had been found, however, by experience, that these could not suffice, and hence the Poor-Law Act, 43 Elizabeth, c. ii., to provide for compulsory contributions. It had also been found, by experience, that too many charitable endowments had been confiscated, through being mixed up with objects considered superstitious (*i. e.*, the supposed benefit the souls of the donors derived from prayers or divine services specially bargained for); and also, probably, that either from fear of such confiscation, similar endowments were discouraged, or that they were often concealed to avoid confiscation, and that this concealment led to another danger, that of embezzlement of the funds. In the charitable endowments subsequent to the statute of Henry VIII. first confiscating gifts to superstitious uses, the donors carefully avoided the danger of such confiscation, by refraining from any express condition or stipulation for the benefit of prayer,

¹ Stat. 21 James, c. 1.

of which was to guard such and the like institutions from fraud and negligence, and make order for fulfilling their

though there could be no doubt that the recipients of their bounty would feel bound to pray for them; and this probably was often covertly suggested in the terms of the endowments, by the use of the term "bedesmen." A few years before this act passed, a case came before the courts, in which a donor in the reign of Henry VIII., just after the Statute of Superstitious Uses, had recited an intention to build houses for a school, for the master, and for certain bedesmen, and then proceeded to give lands for a school and almsmen, avoiding the use of the word "bedesmen." It was held that the Statute of Superstitious Uses did not extend to such good and charitable uses as the uses in this case, but only to take away superstitious uses, as to pray for souls (*i. e.*, particular souls as bargained for), and not to prohibit the erecting of grammar-schools, and relief for poor men. For no time (it was said) was so barbarous as to abolish learning and knowledge, nor so uncharitable as to prohibit relieving the poor (*Porter's Case, Coke's Reps.*, 24). And it was also said, "That almost all the lands belonging to towns or boroughs not incorporate were conveyed to several inhabitants of the parish, and their heirs, upon trust, to employ the profits to such good uses as defraying the tax of the town, repairing the highways, repairing the church, maintaining the poor of the parish; and no such uses were ever made void by the statute Henry VIII., and it would be a thing dishonorable to the law of the land to make such good uses void, and to restrain men from giving lands to such good uses" (*Ibid.*). This was in the 34th year of the queen, and in reporting the case, Lord Coke adds, "That any man at this day may give lands, tenements, or hereditaments to any person and their heirs, for the finding of a preacher, maintenance of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparations of churches, highways, bridges, discharging of poor inhabitants of a town, of common charges, for making of a stock for poor laborers in husbandry, and for poor apprentices, and for the marriage of poor virgins, or for any other charitable uses" (*Ibid.*). Whether this passage was written before or after the statute, it is the best possible description of its scope and purview; and if written afterwards, it is a contemporaneous exposition of it by the highest possible authority. It is to be observed, that Lord Coke speaks of gifts to persons and their heirs, *i. e.*, not corporate bodies, so as to avoid the mortmain laws; and it will be observed, that in the case cited the gift was to certain persons' interests. It is in this age that what are called charitable trusts began to appear, although there are some instances of them in earlier times. A year or two before the present statute passed occurred a remarkable case, in which the statute of 1 Edward VI., as to superstitious uses, was explained and expounded; and it was laid down that wherever the charitable use could be separated from the superstitious use, it should stand. "For God forbid that the ill use should swallow up the good use, which was never the intent of the statute; for the intent of the makers, as appears by the preamble, was to advance and continue good and charitable uses, as grammar-schools, augmentations at the universities, and provisions for poor maids; and therefore, where the good uses were distinct and separate, they should save the land, as if land were given to pay counsels, to a priest to pray for souls, and the rest to repair the church, etc." (*Adams and Lambert's Case, 4 Coke's Reps.*, 112). The cases disclosed were so numerous, and there was such reason to apprehend that the number concealed for fear of confiscation was even greater (in many of which cases possibly the land might be saved for charitable uses), that therefore, quite at the close of this reign, the above statute was passed, on which Sir F. Moore, who drew it, gave an elaborate exposition. Division 1. What

original intention of them. It recites, that whereas lands, hereditaments, goods, and money have been given by many

shall be said to be a charitable use within the intent and meaning of this statute; what shall be said to be a gift, limitation, appointment, or assignment of such a charitable use; what shall be said to be lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money assigned or assignable within this statute. Division 2. What commission shall be said to be well awarded according to this statute; what commission shall be said to be well executed; what persons shall be commissioners according to the statute; what persons shall be jurors according to this statute. Division 3. What shall be a sufficient inquisition; who is a party interested that ought to be called to be present at the inquiry; who a party interested that may have there challenge; what challenge is allowable. Division 4. What decree, order, and judgment good and warranted by this statute; how such a decree, etc., may be executed; what decree, etc., may be undone or altered by the Lord Chancellor, and upon complaint, etc.; what annulment, alteration, etc., of such decrees by the Lord Chancellor shall be good and firm within this statute. Division 5. In what case lands, etc., and goods, etc., given to colleges, etc., or cathedrals, churches, etc., are exempt out of this act; in what cases lands, etc., given to cities or towns corporate are exempted; in what cases lands, etc., given to hospitals or free schools. Division 6. What shall be said a purchase or obtaining upon valuable considerations of money or land, or any estate or interest of into or out of any lands, etc., given to any charitable use within the proviso of this statute; what a valuable consideration; what shall be fraud or covin within this act; what notice sufficient to charge a purchaser; what shall be said a breaking of trust, of defrauding of charitable uses, within this act; what heir, executor, or administrator shall be chargeable with recompense for breach of trust or defrauding of charitable uses by his ancestors, testators, or intestate; what shall be assets in law or equity to make recompense according to this act? Division 1 begins with these words: "And upon the branch of this statute which relates to gifts, limitations, assignments, and appointments, and to lands, tenements, rents, annuities, profits, hereditaments, goods and chattels, money, and stocks of money, given or assigned to charitable uses; and, further, considering what shall be a charitable use within the intent and meaning of this statute; what a gift, limitation, appointment, or assignment of such a charitable use; what shall be said to be lands, tenements, rents, annuities, profits, hereditaments; what goods and chattels, money, and stock of money assigned, are within this statute." Upon which points the law appears to be, that no use shall be taken by equity to be a charitable use within the meaning of this statute, etc.; no use shall be taken by equity to be a charitable use within the meaning of this statute if it be not within the letter or words of the statute, but a use may be construed to be within the meaning of the statute by equity taken upon the letter of the statute, and so within the words "repair of churches, chapels," may be taken by equity; and under the word "church," all convenient ornaments and concurrents convenient for the decent and orderly administration of divine service — as for the finding of a pulpit or a sermon bell, as may be comprehended for reparation of churches — are but preparations for the administration of divine service. And as upon the words of the statute 5 Edward VI., c. iv., against fighting or striking in churches or churchyards, it hath been taken that, if any strike another in a church, chapel, or churchyard, he shall be excommunicated *ipso facto*, by equity of the said statute, upon the word "church and churchyard." So upon the words "repair of churches," may chapels be taken by like equity in this statute. But a gift of lands, as to

well-disposed persons; some for relief of aged, impotent, and poor people; some for maintenance of sick and maimed

maintain a chaplain or minister to celebrate divine service, is neither without the letter nor meaning of this statute, for it was of purpose omitted in the penning of this act, lest the gifts intended to be employed upon purposes grounded upon charity, might, in change of times, contrary to the minds of the givers, be confiscated into the king's treasury; for religion, being variable according to the pleasure of succeeding princes, that which at one time is held for orthodox, may at another be accounted superstitious, and then such lands are confiscated, as appears by the Statute of Chantry, 1 Edward VI., c. xiv. Upon these words, "for relief of aged, impotent, and poor people," poverty is the principal and essential circumstance to bring the gift within the compass of this statute, for a gift to the aged of such a parish, or to the impotent of such a parish, without expressing their poverty, is not within the reach of this act, because they may be rich. But a gift to the poor, without expressing age or impotency, is good enough, for poverty, without further regard, is subject sufficient for charity to work upon. So a gift to all the aged or impotent of such a parish, not assessed in the subsidy, is good, for those which are not assessed in the subsidy are poor within the intent of this statute. So a gift of money to make a stock to bind apprentices, the children of such men are not in the subsidy of goods to relieve bastards in a charitable use, because they are like orphans, having, by intendment of law, no parents to relieve them. To find bows and arrows for the children of poor men in such a parish is good also, because it is an ease to their fathers, which are poor, and yet are bound to find them. "Relief." — Under this word are comprised meat, drink, and apparel, wherein three things are considerable in the gift: 1. That it be for necessity only, not for ornament or superfluity; 2. That it be according to the laws, not against the law; 3. That it be not given to do some act against the law. A gift to build houses for the poor, with four acres to a cottage; to make conduits to such almshouses; to maintain a common laundress for the poor of such houses; to maintain one to read prayers to the poor of such a house; to build a house for the poor to resort unto to receive their alms, pensions, or payments; to provide them weapons for the defence of their houses, not to wear abroad for ostentation; to increase the diet of almsmen upon festival days; but to make seats for poor people to beg in by the highways, is no charitable use within this law, for charity must concur with the law, and the law prohibits, therefore it is no charity to maintain begging. King Henry VII. erected certain almshouses at Westminster for a certain number of poor people, whereof one should be a priest, who, at certain times, was to go about certain places and pray for the souls of the king and his ancestors. Now, although the gift to the poor might seem charitable, yet because it would not consist without a priest to pray for souls, which is superstitious, it was decreed in the Chancery, 27 June anno 30 Jac., that it was no charitable use within the statute (*Simon Peter's Case*). A fine was levied by a recusant to another in Queen Elizabeth's time, and this was in trust, that the profits might be employed upon an hospital of religious, which should be renewed when the times would serve; and in the meantime the profits to be employed to the relief of poor people by the discretion of the conusee and his heirs, according to the intent of the conuser. In this case, because it was apparent that the donor was a recusant, and the employment must be according to his intent, and his intent could be to no other than the relief of poor recusants, which is not agreeable to the law, therefore (term, *Hill.*, 3 Jac.) the land was decreed to the heir of the common law, because the use was not charitable within the meaning of this statute law (*Lady Egerton's Case*). "Sol-

soldiers and mariners, schools of learning, free-schools, and scholars in universities; some for repair of bridges,

diers." — Under this word are contained every one, whether voluntary or pressed, that hath served in any band as a common soldier or captain, but no voluntary victuallers, nor the wives, children, or servants, or maimed soldiers, because they cannot participate of their maims. If an alien be maimed in English service, he is relievable by this statute; but if an Englishman serve in the wars of an alien, he is not a soldier within the meaning of this act. "Mariners." — By this word are understood all necessary servants in a ship, as well as the master of a pilot; so are victuallers, so are artificers, and so are mariners in merchant ships, as well as in the king's, or in ships of war, because the merchants are employed in service of the realm, as well as men-of-war; but neither the owners nor passengers, nor bargemen, nor wherry-men, nor such as serve in the ships of aliens, or such ships as go to sea without letters of mart, are no mariners within the intent of this law. "Sick and maimed." — These words must be taken disjunctively and dividedly, so that "and" must be construed for "or;" for, if the party be either sick or maimed, he is relievable; but if he be sick, his relief must last no longer than the time of his sickness; and the sickness must be such as ariseth by reason of service, as of fluxes, consumptions, as a maim is a hurt that disables him for serving any more as a soldier or a mariner. If the maim happened in lawful service, the party is relievable; and therefore, if in conductions or in camp, a soldier be maimed by misadventure, he is relievable, although he depart from service without license after the maim taken, because the maim was lawful. But if one serve an enemy, and he be there maimed, although he be after pardoned, yet he is not to be relieved by this law. So if his hand be cut off for an offence, though he were in an English band, because it was not his service. "Schools of learning." — Such are schools of writing, reading of languages, music, or any mathematical sciences, playing of organs by men; because such music is used in churches. But no schools of dancing or fencing are within the intent of this law, because they are matters of delicacy, not necessity. No schools for catechising, because religion is variable, and not within this statute. "Free-schools." — These are to be understood grammar-schools, and all things requisite thereunto, as provision for the room, for the schools, the master, and usher, and the lodgings, etc. "Scholars in universities." — These general words must be restrained to the particular universities of Oxford and Cambridge, and to such students as study divinity, physic, or law; not students in arts only, nor to any students of divinity in property, etc. A recusant made a feoffment of certain lands to divers others, upon hope that they would employ the profits of the land to the use of poor scholars in Oxford or Cambridge, or elsewhere, being such as studied divinity, and took holy orders, according to the discretion of the feoffees, and agreeable to the intent of the feoffees in this case, because the party was a recusant, and his intent, by the words, might appear to be that the misemployment should be upon poor popish priests; for the words elsewhere in the meaning is some foreign university, and the holy orders they intend are popish. Therefore (16 Nov., 3 Jac.), it was decreed that the heir should have the land, because the use and employment was not charitable, but superstitious, and not upon scholars within the meaning of this law. If a man give a stock of money to be put out to young tradesmen at £5 per £100, the interest money to be employed upon young students in divinity to provide them living withal, this use to the students is not a charitable use, because it depends upon usury, and maintains simony. If a poor scholar be married, or be placed in the college of physicians, he is not to be relieved by this statute, because it is presumed he

ports, havens, causeways, churches, sea-banks, and highways; some for education and preferment of orphans;

hath competent advancement. "For repair of bridges."—Such only are intended as are for public passage, not private use. "Ports and havens."—Such only as tend to safety of ships of sail, not other vessels, and creeks of harbor which are employed to find lights to guide ships into the haven, is a charitable use within these words. An imposition granted upon commodities imported or transported, to be employed upon repair of ports or havens where they shall land, is a charitable use, and within this statute. Common ports or watering-places are within the equity of these words. "Sea-banks," intend only where the sea ebbs and flows; and a gift to repair sea-banks is good, notwithstanding others stand bound by covenant and prescription to repair them, because it is a common good in preventing a common danger. "Orphans" are those that are poor and parentless; and such are bastards, after the death of their mother, and are to be relieved, until by intentment they are able to get their living, which is the age of twenty-one years. If a parentless poor child be married under twelve years of age, it continues an orphan until the age of assent. No servant or apprentice is an orphan within the statute, because they have masters, which are in lieu of parents to provide for them; but a scholar may be an orphan until twenty-one years of age. Education and preferment of orphans' lands, given to buy horses and to provide a rider to teach orphans to ride, which hold by knight's service, is within this law. Houses of correction cannot be founded by charter without an act of parliament, because it tends to corporeal punishment, which cannot be inflicted without parliament; but justices at their sessions may find one by virtue of the act of parliament made 39 Eliz. A gift of money to erect a house of correction is good, and within the meaning of this law. "Marriage of poor maids."—These words extend not to such as have parents able to give portions with them, nor to such as have legacies given them, nor to such as are incontinent, nor such as marry without or against the consent of their parents. But though they have uncles, and able to give portions, yet they are poor within this law. To provide them wedding-apparel or an offering-dinner is a good use; but not to provide them wedding-rings, because that is the husband's part. "Young tradesmen not after five years continuance in trade."—Persons decayed bankrupts are within these words if they lie in prison, not if they keep their houses, because they have submitted themselves to the law, and the Statute for Charitable Uses was made after the Statute of Bankrupts. Such as are decayed by negligence, fraud of servants, or casualty by fire, etc., are within this law; but such as are decayed by suretyship are not relievable by this act. To lend to young tradesmen under £10, the £100 is charity; but to employ the interest is not within this statute, because no charity can arise out of usury, all usury being unlawful. For relief or redemption of prisoners or captives, to prisoners upon præmunire, or upon executions upon condemnations, are relievable; but seminaries committed by the high commissioners are not, because the ground of their restraint is a contempt. An enemy taken captive by another Christian is not relievable; but if a Christian be captive to a Turk he is relievable, because he was taken prisoner in defence of a common cause, for the Turk is *hostis communis* to all Christians. A gift was made to relieve such as were imprisoned for their conscience sake. It was agreed in *Throgmorton and Gray's Case*, 41 Eliz., that if they were in prison in subjection to the law upon condemnation, they were relievable; if upon obstinacy, not to be relieved by the charity of this law. Turks and infidels are not *perpetui inimici*, nor is there a particular enmity between them and us; but this is a common error, founded on a groundless opinion

some for or towards relief, stock, or maintenance for houses of correction; some for marriages of poor maids;

of Justice Brooks; for although there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons: they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons (*Littleton's Readings on stat. 27 Edw. III., 17 MS., Salk., 46; vide Calvin's Case, 7 Rep., 17 stat. 21 Hen. VIII.; Omychund v. Barker, 1 Atk., 21*). The wife and children of prisoners are not within the equity of this act. Taxes-subsidies are not within the meaning of this word, because poor men pay them not, and see no ease to discharge them of that tax. But all taxes wherewith the poor as well as rich are chargeable are within the intent of this law, as keeping of watching, pursuing of hue and cries, etc.; but fines for robberies are not within this act. Penalties of statutes *non obstantes*, monopolies, and such kind of privileges, cannot be granted to a charitable use upon the first division. In all other grants, so in a gift to a charitable use, it is said, that these four things are principally to be considered: 1. The ability of the donor; 2. The capacity of the donee; 3. The instrument or means whereby it is given; 4. And, lastly, the thing itself which is or may be given to a charitable use. Those persons which are disabled to be donors by the common law or by statute are disabled to give a charitable use; such are infants, married women, idiots, madmen, lunatics, accountants to the king, bankrupts, etc. If an infant make a feoffment to a charitable use, with a letter of attorney, to deliver seisin, this is merely void; but if he levy a fine, or make livery himself, these are but voidable. So, if a married woman levy a fine to a charitable use, this is good, until it be reversed. If the husband and his wife levy a fine of the wife's land, and the wife only declares the use, if the husband survive, the use is void; but if the wife survive, the use is good. A married woman, executrix to another man, may give the goods which she hath as executrix to a charitable use. If an idiot, madman, or lunatic make a gift to a charitable use, it is good, until an office be found of their idiocy, etc. If a bankrupt make a gift to a charitable use, it is good until a commission be awarded and executed. So if an accountant make a gift, it is good until it appeareth he is not sufficient otherwise to make satisfaction. Persons disabled to be donors may be donees or feoffees to a charitable use, and such as cannot be feoffees to other uses may have lands to a charitable use. If a feoffment be made to a dean and chapter, upon condition to perform a charitable use, it is good, though they cannot be seized to another man's use. A bankrupt, or accountant, or a recusant may be feoffees of donees to a charitable use. If the daughter, being heir, gives the land descended to a charitable use, and then a son be born, the son shall avoid the gift. But if the father had been a feoffee upon condition that he or his heirs should give the land to a charitable use, and the daughter had made such a feoffment before the birth of the son, that should have bound the son, because it was no more than the son himself should have performed by reason of the condition. A gift was made to a parson and his successors to the use of the poor of the parish; the parson made a lease for thirty years; the lessee did not perform the use, and the poor made an entry: in this case it was resolved that the gift was good, and that the lease for so many years was good also, notwithstanding the stat. 13 Eliz., c. 10; and the reasons were—1. Because it could not tend to the impoverishment of the successor, insomuch as it was given to a charitable use (*Banister's Case in the Star Chamber, 44 Eliz.*). Lands are given to an idiot for a charitable use. This is good, until an office find him an idiot; but after office found it shall be void during his life, and then after his decease it shall be revived in his heir. A gift made unto a married woman, if her

some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and others for re-

husband disagree, the gift is void. If lands or goods be devised to one by will, or a remainder limited to one by deed, to perform a charitable use, if the devisee will refuse the legacy or the grantee waive his remainder, and that by fraud or covin, they are compellable to take the land, and to perform the use. The king gives land, *probis hominibus de D.* (which was no corporation before), rendering a certain rent, and the residue of the profits to repair a bridge, etc., and after the king releases the rent of farm in this case, though the reservation of the farm was the cause of their corporation and capacity, which being released, their capacity should seem determined; yet, for the preservation of the charitable use they shall continue a corporation for that purpose only. A gift to a parish by deed to a charitable use is void, but a devise by will is good; and the churchwardens and overseers shall take it in succession, and in London, the mayor and the commonalty (40 Ass., 26). A charitable use cannot be limited upon an estate, in dower, nor upon a gift in frank-marriage, nor upon exchange made of lands; but a jointure may be made to a charitable use, because it may be upon condition (*Vernon's Case*, 4 Co., 2). And wheresoever a condition is limitable, there a charitable use is appointable. It may be limited upon a gift in tail, by a render, by fine upon a gift, *cause matrimonii prælocuti*, upon a release of right, action, entry, etc., or anything valuable upon a bargain and sale of land. It may be averred that it was to a charitable use upon a feoffment, without attornment upon a bargain and sale, without enrolment. If a man bequeath £300 to three parishes equally, to be let out at £5 per £100 by the churchwardens of each parish, this legacy is not within this statute, but yet the chancellor may give remedy by equity in Chancery. *G.* gave lands to poor of the hospital of Reading (44 *Eliz.*); now the hospital was no corporation, and so not capable; but the mayor and burgesses were governors and supervisors of it. The land in equity was decreed to the mayor and burgesses to the use of the poor to that hospital. Where the things given may pass without deed, a charitable use may be averred by witnesses; but where the things cannot pass without a deed, there charitable uses cannot be averred without a deed proving the use. If a fine be levied, *sur grant et render*, a charitable use cannot be averred without a deed; but if a fine be levied, and a use expressed in another deed, that expressed use may be averred without deed to be a charitable use, and upon confidence; so may an averment be taken by parole of a charitable use, which is agreeable to the use expressed. (This was very important, and was applied to the creation of secret trusts for the support of the Roman Catholic religion.) "If a man make a feoffment upon condition that the feoffees shall perform a charitable use, if the feoffor himself re-enter for the condition broken, the use is destroyed; but if his heir enter for breach of the condition, he shall perform the use, because he comes in upon confidence, and the condition was compulsory to perform the use. There are five manner of things which cannot be granted to a charitable use: 1. Things that yield no profits; 2. Things that are incident to others, and inseparable; 3. Possibilities of interest; 4. Conditions; 5. The copyholds, if any way prejudicial to the lords. If one mortgage or devise that if his heirs redeem the land he shall perform a charitable use, the heir is not charitable, for his father had but a bare condition; and yet, if the mortgager devise that his executors shall pay the money to redeem the land, or if he devise money to his heir to redeem the land, and devise further, that when the heir hath redeemed the land he shall perform a charitable use, this devise is well limited, and the heir is charitable with it. The statute of wills binds not this statute, for if tenant by knight-service dispose of two parts of his lands for the ad-

demption and relief of prisoners or captives, and for aid or ease of any poor inhabitants, concerning payments of

vancement of his wife and children, etc., and after devise by his will that his heirs shall perform a charitable use with the third part, the heir shall be charged with the use, because he is in by descent. If a man appoint by his will that his executors prosecute an action of debt, detinue, covenant, etc., and that all which they recovered in such an action shall be employed to a charitable use, this use is well limited upon such a possibility, etc. The inquisition must be made both of the gift and the abuse, etc., not of one alone, for then it is imperfect and void. If a jury find the substance of the gift or abuse, etc., it is sufficient, though they vary in some particulars, or find not the circumstances. Therefore, if they find a gift made *per quemdam ignotum quibusdam ignotis*, it is good enough, for they have found a gift, which is the substance; so if the gift were made by fine, and they find it was made by feoffment, or if it were by feoffment to uses, and they find it was given by will, this is good enough, for the gift is the substance, and the form of conveyance but a circumstance. So, if they find the general use truly, though they miss in the particular, this is sufficient. Therefore, if they find a gift to provide books for poor scholars, and the gift was to buy them gowns, it is good enough; because the general use for the poor scholars is truly found, and books or gowns are but particulars of the employment. So, if they find a gift to provide stones to repair highways, and the gift was to buy gravel to repair them, this is sufficient; for they truly found a gift for repair of highways, which is the general, though they missed in the particulars of stones and gravel. So, if they find a gift to maintain poor scholars in an university, it is well enough, though the gift were to find two poor scholars, students in divinity, for the general or poor scholars is found truly. If there be two or more charitable uses limited by the donor, and the jury find but one, yet the inquisition is good, for that if the other be found after. But if the jury vary in any general head (from the truth of the gift), limited in that act, that inquisition is void. Therefore, if they find a gift for relief of poor scholars, which was for maimed soldiers, or for repair of highways, where it is for marriages of poor maids, etc., these inquisitions are insufficient, because they fail in the general, which is of the substance of the charitable use. Lands are devised to one for a charitable use; the devisee, by covin with the heir, waives the devise; this is a fraud inquirable. The feoffee aliens in mortmain, and purchases the land of the king again, etc.; this is a fraud. Tenant in tail grants a rent to a charitable use, and levies a fine without proclamations; the issue in tail combines with the conusee to bargain and sell the land to his father, who lay sick, to the intent that his father might die seized, and the rent might be avoided—this is a fraud. A man deviseth a sum of money to his heir to redeem certain lands that he had mortgaged, to the intent it should be employed to a charitable use; the heir refuseth the legacy, and by collusion with the mortgagee suffers the day to pass, and then redeems the land—this is a fraud inquirable. Land is given to a woman for a charitable use; the husband, by covin, disagrees to the gift—this is a fraud. A father gives land to his youngest son, upon condition to perform a charitable use; the father dies, the elder son dies, yet the youngest son shall be bound to perform the use, notwithstanding the condition was extinct in him by descent; and though the father had released the condition, yet the same has been liable to the use. Tenant for life surrenders, with warranty in fee to a charitable use, the lessor recovers in value; he shall hold that land charged with the use forever. If sixteen be impanelled on a jury, and twelve only agree, yet this is a good inquisition, according to the statute. Besides this inquisition by the oaths of twelve men, the commissioners may inquire by

fifteenths, setting out of soldiers, and other taxes; which donations had not been employed according to the design

all lawful ways and means, such as former inquisitions, witnesses, rentals, accompts, entreats, etc., and their own proper knowledge, and by these means they may supply the defects of the inquisition in matters of particularity and circumstance, as where the inquest find a gift to the tradesmen. So where the jury finds a misemployment, the commissioners may supply the time, how long it hath been misemployment, etc. But if the commissioners cannot proceed without summoning the parties interested to be present, those parties only who are in possession ought necessarily to be summoned; and those who have rights, titles, pretences (or pocket-titles) may be omitted, and yet the inquisition is good enough. An occupant is a party interested that must be summoned, and he shall be bound by the inquisition; but the decree shall not bind him in reversion, but that he may avoid all without complaining by bill. If the party be summoned, the decree shall bind him, though he were absent from the inquiry. He which hath the nomination of the persons upon whom the alms ought to be employed, is a party interested to be called. The persons which ought to receive the alms are not persons interested to be summoned; but if the alms have been employed upon such as ought not to have received them, they are parties interested, and ought to be called. Every wrongful possessor is a party interested, to be summoned and charged. The calling is a notice given to the person of the party interested concerning the inquiry to be taken before the commissioners at a certain time and place. The party interested is summoned for two purposes: 1. To give in evidence; 2. To take his challenge to the jurors. What commissioners may make a decree according to their commission, and warranted by this statute. For the second point, the commissioners are restrained to three things in the making of their decrees and orders: 1. That it tend and conduce to the employment of the things given; 2. That the employment be faithful and due; 3. That the employment vary not from the use and intent for which the things were given. The three things being observed, the commissioners have power and authority to do five things more: 1. They may establish the property of the things given in the person to whom it was given, or they may transfer it from one person to another; 2. They may supply the defects of the gifts or employment in certainties, circumstances, and decencies; 3. They may ordain conveyances of assurances to be made for the better employment of the use; 4. They may add decencies in the employment for the honor of the donor; 5. They may impose penalties for misemployments. Commissioners by their decrees cannot confirm leases, nor release debts or stocks of money, nor erect corporations, nor remit arrearages, nor decree that the land shall be leased at an undervalue, either in regard of the fine or the rent; neither that it shall be leased to their friends, for the apparent presumption of favor undervalues; neither can they ordain that their own servants shall be the poor on whom the charitable use shall be employed, especially if they be able to maintain themselves. In the 11th year of King Henry VI., a gift was made to the intent to find a chaplain *ad divina celebranda*, until the feoffor or his heirs should procure a foundation, etc.; there was no employment until the 3d year of King Edward VI. And, therefore, in the queen's time, one Payne purchased the land as a concealment. After a commission being awarded upon this statute, the commissioners inquired, and found the gift, and thereupon decreed the property to another from Payne; but afterwards this decree was made void by the Lord Chancellor, because the use limited to find a chaplain *ad divina celebranda* was no use within the statute inquirable; but the chancellor, by his Chancery authority, may and did decree the land

of the founders, by reason of breaches of trusts and omissions of those who should pay, deliver, or employ them;

to the first use; for a gift *cuidam capellano ad divina celebranda* in a certain church or chapel is no superstitious use within the statute 1 Edward VI.; and so was the opinion of the justices in the king's bench (*Paschæ*, 3 Jac.); and the reason is, because it is the general case of all parsons in England; but if the use had been within this statute, the commissioners might have transferred the property. The commissioners may decree that one shall make a release for assurance of the land; they may decree that the party shall pay the arrearages; and if they fail at the times, they shall pay a reasonable penalty. If the use were limited for a chaplain, they may decree by addition that the chaplain shall be a preacher. So they may appoint the nomination of him to a man of science (as a master of college, etc.); because such things concur in decency and order with the intent of the founder, upon a decree made—anno 40 Elizabeth. Concerning a grammar-school of Northleach, which is now incorporated by parliament, 5 Jac., cap. vii., five things are observable: 1. That if there be a grammar-school in a town, and a man devise land to certain persons, upon condition that they shall procure that grammar-school to be incorporated, and to find that grammar-school in such case, though the corporation be not procured, yet the profits must be employed upon the school in being; 2. Though the heir enter for fault of employment, yet he shall be charged with the use; 3. If they decree the land to the heir which hath entered, or might enter by virtue of such condition, the decree is good, because he had color to defeat the use by entry, but because the use thereby seems better established, the decree is good—as if the tenant in tail grants a rent unto one which had a right for a release of his right, that grant shall bind the issue in tail, because it strengthens his possession; 4. If a founder appoint the use of the land to be for a certain number of the poor, and that every one shall have 12d., the commissioners may appoint by way of increase that every one shall have 20d. But if the number of the poor limited by the founder be uncertain, the commissioners cannot add any more poor to that number upon whom the use shall be employed. 5. If a man founds a free school, and appoints the nomination of the master of the heir, the commissioners may decree it to be a man of science, because it concurs with the intent of the founder to have one of sufficiency. In the time of King Richard II. one Adderbury by license founded almshouses in Dennington in Berkshire, consisting of a certain number, appointing that his heirs should have the nomination of the poor; and after, in the reign of King Henry VII., his heir died without heir now, although the corporation was determined for want of a nominator, and the commissioners may not erect or revive a corporation, yet they, upon commission awarded, did and might decree who shall be a nominator, for the authority of nomination could not escheat to the lord. If the donor limit the employment of the profits to persons of one sex, quality, nation, trade, or profession, the commissioners cannot decree the employment to persons of another sex, quality, nation, trade, or profession. So if the employment be appointed to be upon the poor of one parish, or the parishioners of one parish, or the prisoners of one prison, or the scholars of one grammar-school uncertain, the commissioners' power cannot decree it to the poor of another parish, to the prisoners of another gaol, nor to the scholars of another school, for that were contrary to the intent of the donor. So if the use be limited for the use of divers purposes, or for relief of the poor and amending highways, etc., the commissioners cannot (interleasing one) decree the employment of the one upon the other only, but they may by their donor appoint the time when or the place where it shall be paid. If the use be

for remedy whereof it is thereby enacted, that the chancellor (and the chancellor of the Duchy of Lancaster

limited for relief of many soldiers, they may by decree add a surgeon or physician, and allow them fees for curing such soldiers. But if the use be to ease a parish of fifteenths, the commissioners by their decree cannot extend this to ease the parish of charges for bastards born in the parish. Yet if it be for relief of poor, the commissioners may ordain that it shall be a stock of money to provide hemp, iron, etc., to set the poor in work upon. If the donor appoint the employment to be in money, meat, or apparel, the commissioners cannot charge the employment. The commissioners cannot decree the forfeiture of an obligation to be taken, but they may impose a reasonable penalty for not paying at the day. They cannot, by their decree, commit any man to prison, nor decree that he shall be imprisoned; yet, upon execution of their decree, after the writ awarded, and an attachment served, the Lord Chancellor may imprison the party for execution of the decree. The commissioners may decree that a house of correction shall be erected by deed enrolled, allowing £20 per annum, according to the statute of 39 Elizabeth, c. v. They may decree land to a corporation *in esse*, without danger of mortmain. Unto a general limitation of the giver, the commissioners by their decree may add particular limitations, as if the donor limit the employment to marry poor maids, the commissioners may decree that such maids which marry without the consent of their parents, or within age, of consent, or which marry with their ravishers, or which were gotten with child before marriage, or marry without the orders of our church, shall have no part of that money, and such a decree is good, because the additions are reasonable. So when a sum in gross is given to marry poor maids, they may, by their decree, set down how much every one that is married shall have given with her. So if a gift be made to redeem captives, they may decree that no part shall be employed to redeem any traitor that is taken prisoner, nor any enemy that is taken prisoner, unless he be taken captive by the Turk. A stock of money is given in deposit, to be expended in three years about the repairing of a bridge; if there be apparent likelihood that the bridge, without the employment of the whole, in a shorter time will fall down, they may decree that the sum may be bestowed in a shorter time. If goods be given for a house of correction, they cannot decree the employment out of the house. For the third point, the rule is, that those which have rights, titles, estate, and interest paramount to the donor shall not be bound by any decree, though they were summoned and present at the inquiry, but all those whom the donor might have bound by his own act or conveyance shall be bound by the decree of the commissioners. A commission for sewers is to be preferred before a commission upon statute of charitable use, if they concur not in jurisdiction, as if the commissioners for sewers decree that land which was given for repair of highways shall be sold, etc. The commissioners upon this statute cannot make a decree for the charitable use, because they vary in point of jurisdiction and employment of the use. But if the land decreed by commissioners of sewers were given for the repair of sea-banks, the commissioners upon this statute may decree as well as they, because they agree in the employment. If an obligation be made to a recusant convict for security of money given to a charitable use, although the obligation cannot be put in suit in the name of the recusant to whom it was made, because he is a person excommunicate, and so disabled to sue any action, yet the commissioners may decree the payment of the money, and it shall bind the party to pay the principal, but not the forfeiture. A man devises that his executors shall sell his land, and that the money received shall be employed to a charitable use, if the executors refuse to sell it, the commis-

within his jurisdiction) may from time to time award commissions under the great seal to the bishop of every

sioners by decree may bind them to sell it, and upon a writ of execution out of the Chancery upon the decree, they shall be compelled to sell it; and it seems, in that case, if the commissioners decree that the heir shall sell that land, the heir shall be bound by the decree, because the intent of the devisor was, that the land should be sold to a charitable use. One Symons, an alderman of Winchester, sold certain land to Sir Thomas Flemming, now Lord Chief-Justice, then recorder of that town; and this was upon confidence to perform a charitable use, which the said Symons declared by his last will that Sir Thomas Flemming should perform. The bargain was never enrolled; yet the Lord Chancellor decreed that the heir should sell the land, to be disposed according to the limitation of the use; and this decree was made the 24th of Queen Elizabeth, before the Statute of Charitable Uses; and this decree was made upon ordinary and judicial equity in Chancery; and therefore it seems the commissioners upon this statute may decree as much in the like case. If a reversion be granted to a charitable use, the particular tenant shall be bound to attorn by the decree of the commissioners; and it was said, there are precedents in Chancery where the Lord Chancellor had decreed and compelled the tenant to attorn. If goods be devised to a charitable use, the commissioners by decree may bind and compel the executors to deliver the goods. Concerning the awarding of staying execution by the Lord Chancellor touching decrees made by the commissioners, three points are to be considered upon two branches of the statute: 1. What decree shall be said to be so made that the Lord Chancellor ought to award or stay execution thereupon? 2. What decree shall be said to be so certified as the Lord Chancellor ought thereupon to stay or award execution? 3. What manner of execution the Lord Chancellor may award for execution of decrees well made and certified? For the first, if poor commissioners make a decree, and one of them was a person disabled, or if they make a decree of anything out of their commission, or decree anything against the common law or statutes or ordinances of the church, or varying or repugnant to the intent of the founders or donors, etc., and these and the like be showed unto the chancellor, because it appears that the decree was not well made, the chancellor ought to stay execution. As to the Lord Chancellor's power of execution, the manner of execution is referred to the Lord Chancellor, and yet his discretion should be limited and confined in awarding process of execution unto the usual course of justice in courts of equity. But the usual manner is to award a writ of execution framed by advice for the purpose upon the statute; and after that an attachment, and then imprisonment of the party until performance; but he may at his pleasure award an *habere facias seisinam*, if the decree concerned the disposing of land, and thereupon may also grant a commission to keep the party in possession. Upon the third branch of the fourth division there is given to the Lord Chancellor a directory, declaratory, and additional and compulsory power by this statute, which he may exercise upon complaint by a party aggrieved, that the commissioners have not pursued their authority. A party aggrieved is whosoever hath *bonum omissum*, or *malorum commissum*, by the decree; whosoever is interested and hath a property and ownership of goods and lands to his own use; whosoever, by the decree, hath prejudice either in law or equity is *pars gravata*, and may complain by bill. But where the prejudice is common or general, there every man may complain as *amicus curiæ*, not as a party aggrieved; as where lands given to repair bridges or highways, which are public easements, there any man may complain if the decree limit the use to any other purpose. If a stock be given to be let out

diocese (and to the chancellor, if no bishop at the time), and to other persons of good and sound behavior, author-

to poor tradesmen of a town, and this be decreed only to clothiers, the other tradesmen are *pars gravata*; so if to artisans, and it be decreed only to haberdashers, etc., the others are *pars gravata*. If the commissioners decree that the arrear of the profits given to a charitable use shall be paid in two years, the Lord Chancellor may alter the decree in the point of time, and limit a longer or shorter day of payment. If the gift be general for the maintenance of a school, and the decree be made for a grammar-school, the Lord Chancellor may alter the decree, and appoint it for a writing-school. If the donor give money to be lent to poor tradesmen, and the decree limits the time how long they shall have it; yet the Lord Chancellor may limit a longer or shorter time of the loan. But if the gift be given to make a causeway in a place certain, and it is decreed accordingly, the Lord Chancellor cannot alter the place, but he may change the employment from a causeway to make a bridge if in his discretion he thinks fit, because the passage was the principal, which being observed, the conveniency whether a causeway or a bridge were fittest is in the chancellor's discretion to appoint. If the donor ordain that the relief be given in bread, and it be decreed accordingly, the Lord Chancellor cannot alter the relief to be given in money, for the kind should be charged. So if the relief be appointed to be given at Christmas, the decree accordingly cannot be altered to another feast, because the honor of the particular feast seems essential to the gift. So if the gift and decree be for such poor as shall come and hear a sermon at St. Paul's, it cannot be altered to Westminster, for the place is material. But assets in law must satisfy debts before charity, because the common law must order their disposition. Yet charity must be preferred before legacies in disposition of assets of law. Lands were given to find an obit in such a chapel, appointed a certain sum upon it, and that the residue should be employed for the reparation of the chapel in which the obit should be celebrated. In this case it was adjudged that all the land was given to the king, for the one doth depend upon the other. And by Popham, this case cited *Pasch.*, 10 *Eliz.*, *Rot.*, 393: One Draiton, seized of land in fee in London, devised it to the dean and chapter of St. Paul's, on condition that they find two chaplains to pray for his soul in a chapel newly built by him, and to pay to them for their salary £13, 6s. 8d., and to find an obit appointing upon it a certain sum, and to repair the chapel, and this found within the five years. Yet it was adjudged against the king (*Colborn v. Dale*, *T.*, 1578, *B. R. Duke*, 89, 4 *Coke*, 116). Thomas Wills (12 *Edw. IV.*), devised houses in London, worth £24 per annum, to his wife for life, remainder to the parson and churchwardens of St. Edmonds and their successors; and devised that his wife during her life, and they in remainder, should find a priest to say divine service at the altar in the chapel of Our Lady in the church of St. Edmonds for the souls, etc., and that the same priest should be aiding and assisting to divine service in the church, and that his wife for her life, and they in remainder after, should pay to him for his salary £6, 13s. 4d. Further, he devised that they found with six priests, and appointed 22s. certain, to be employed upon it, whereof part to be distributed amongst the poor of the trade of drapers which should come to the said obit and could not come. Also, he appointed 16d. yearly to the parson of St. Edmonds for the beading of beads every Sunday; 3s. 4d., to the friars of St. Augustin to pray for his soul. Also, 4s. yearly to be paid to the preacher at St. Paul's upon Good Friday. To three preachers at the Spittle to commend his soul to the prayers of the people, 13s. 4d. Also, 3s. 4d. to the wardens of the company of Shearman, to distribute amongst the poor almsmen of that trade, to the

izing them, or any four of them, to inquire, as well by the oaths of twelve lawful men or more of the county, and by all other good and lawful means, of all such gifts and appointments; and of abuses, breaches of trust, mis-employments, concealing, or misgovernment of lands, hereditaments, goods, and money appointed for any of the charitable and godly uses before mentioned. And the commissioners, after inquiry, shall make orders, judgment, and decrees for faithfully employing such gifts to the charitable uses and intents for which they were appointed, with an appeal therefrom to the chancellor.

This act is not to extend to the two universities, nor to the colleges of Westminster, Eton, or Winchester, nor to any cathedral or collegiate church, nor to any city or town corporate, nor to any lands given to such uses within a town corporate or city, where there is a special governor appointed to direct and dispose such lands and gifts, nor to any college, hospital, or free-school which have special visitors, governors, or overseers appointed by the founder, nor be prejudicial to the jurisdiction of the ordinary.

These are the provisions made by this famous statute, which, upon the face of it, appears nothing more than an ordinance prescribing a mode of visiting and correcting the government of public charities, under a commission from the great seal. However, the anxiety hereby shown

intent that those of the warders, with eight or more of the said company, upon warning, should come to his obit. Also he appointed accounts yearly to be taken, and that the churchwardens of St. Edmonds should have the letting and setting of his land, and the churchwardens of St. Mary Woolnaught should come yearly, and have for their pains 6s. apiece, and the churchwardens of St. Edmonds to have 6s. 8d.; and 11s. 4d. yearly appointed for the finding of books and ornaments and vestments of the chapel where he appointed his obit to be celebrated, and that all the revenue coming of the premises shall be in several keeping, separated from other moneys in a chest for the reparation and new building of the tenements. And it was adjudged, that the houses were given to the king; for all else, the king shall never have the land itself, which was never limited to the priest, and though the prayers were to be made out of the church, it is within the statute. The words "church" or "chapel," extended to lamps and lights, not to prayers. It says "anniversary or like thing," and this is like thing, in the bare case these words that his friends should have the residue of the profits of the lands. But in that case, because the obit was not found within the five years, the king could not have the land. And therein this difference was taken where certain sums are limited to superstitious uses, and one use is separate and divided from the other. There the finding of one will not give all the land to the king, nor anything, upon the reparation of the church or chapel within the five years, yet all the land will go to the king.

to protect and encourage such benevolent establishments was, in after-times, made use of to deduce consequences not intended or foreseen by the makers of the act. It has been held, that gifts to corporations and bequests of estates-tail, without a recovery, are made valid by this statute under the idea of appointments to charitable uses.¹

While the parliament were consulting for the encouragement and due order of these institutions, it passed several acts for the preservation of another kind of public property, the possessions of the church: these had of late suffered considerable dilapidations (a). The revenues of bishoprics had always lain at

Of church leases.

(a) Principally at the hands of the crown. The conduct of Elizabeth with reference to the established church surpassed that of the worst of the Norman sovereigns. "She kept," says Hume, "the see of Ely vacant for not less than nineteen years in order to retain the revenue" (*Strype*, iv., 351); "and it was usual for her," he adds, "when she promoted a bishop, to take the opportunity of pillaging the see of some of its manors" (*Ibid.*, 215). It is manifest, therefore, that the scope of the act could not have been protection of the benefices of the church, unless, indeed, it was for their protection from the crown. But as no statute was passed except at the instance of the queen's council, it is probable that the real object was to facilitate the plunder of the sees by preventing any one as much as possible from profiting by the temporalities except the crown and its favorites. Leases had been used by the religious houses, in apprehension of suppression, to secure the benefit of the property as long as possible and as far as possible from the hands of the rapacious courtiers, who were the principal promoters of spoliation; and leases might be made use of by bishops in the same way, and no doubt were. The existence of a lease would seem to prevent immediate plunder to any present benefit from it; and hence in all probability this statute, which cannot be supposed to have been provided by such a sovereign as Elizabeth in the interest of the church. Two acts were passed in one of the first sessions, by the first of which all the ecclesiastical property restored by Queen Mary to the church was reannexed to the crown, and by the other, the queen was empowered, on the vacancy of any bishopric, to take possession of the lands belonging to the bishopric, with the exception of the chief mansion-house and its domains, on condition that she gave an equivalent in tithes and personages appropriate. Now by the deprivation of the Catholic prelates, every bishopric but one had become vacant, and commissioners had been appointed to carry into effect the change contemplated by the act. The new prelates had to submit to this attempt to tear from their respective sees the most valuable of their possessions. The queen refused to accept their homage or to restore their temporalities until the work of spoliation was complete. They then accepted their bishoprics in the state to which they were reduced, and the lands taken from them were distributed by the queen among her favorites (*Strype*, i., 97; *Statutes of the Realm*, iv., 381). It need hardly be said that no statutes passed under such a sovereign could have been passed for the protection of the property of the church. No doubt many charities were saved from confiscation. It was found at the end of the reign of Elizabeth, that one Hart, in the 26th of

¹ 2 Atk., 552, 553. Duke's Cha. Uses, 84.

the mercy of the crown ; which, on the restitution of the temporalties, would reserve to itself out of them what it

Henry VI., devised two leases in Walbrook in London, to the churchwardens of St. Stephen, Walbrook, to their uses—1. To find an obit and to bestow 3s. 4d. annually upon an obit in the church ; 2. To repair the houses ; 3. To bestow the residue upon the repairs of the church and to provide ornaments in it. But the devise was conditional, that if they failed to find the obit, that then the estate should cease, and the land go to the corporation of London ; and that they should find the obit, and bestow the residue of the profits upon London Bridge. And it appeared that the obit was well maintained within five years before the act ; and the question was whether the houses were given to the queen, and it was held not ; for that the queen should have no more than that which was appointed for the maintenance of the obit, and not that which was given for the repairs and ornaments, which were good uses (*Hart v. Brewer, Cro. Eliz.*, 449). For although the obit was appointed to be in the church, yet the church was for divers other good purposes, and for those good uses the church ought not to be refused these ornaments, and the letter of the statute was plain that the king shall have that only which was given to superstitious uses. And it was said that in the case of the town of Wakefield, house and lands were given to give part of the profits to a priest to say mass, and other parts of the profits for the repair of the house, and the repair of a bridge ; and it was adjudged that the queen should have all but what was given for the repair of the bridge. And it was also said that there had been a case where land was given to find a priest to say mass, and also to give part to the poor ; and because the part to be given to the poor was uncertain, the queen had all ; but there was no express difference by the letter of the statute between land given for the maintenance of an obit and land given for the maintenance of a priest (*Ibid.*). Upon this, the following case arose in the reign of Elizabeth : An ancestor of Sir Edward Clare devised land to certain persons and their heirs, upon the trust and confidence that they should, out of the profits, erect a free-school, and pay so much to the master yearly, and so much to the usher, and should give £10 per annum to five poor men ; and it was found that the land was not so employed, nor any school erected, nor any usher paid ; and the question was, whether for this breach of condition Sir Edward Clare might re-enter on the land ? which raised two points, — whether the uses were void by the statute, and whether they made a condition ? And it was held that it was not void by the statute, for that was only to restrain superstitious uses, and not to restrain such as were in favor of learning and relief of the poor. And, further, it was held, that the words being “upon trust and confidence,” showed that the donor reposed trust in them, and would not have the land return for non-performance of it, so that it was not a condition, but a trust (*Martindale v. Martin, Cro. Eliz.*, 288). The validity of confiscations under the statutes of chantries was contested in numerous cases in subsequent reigns. Thus, in the reign of James I., this case arose. The Dean and Chapter of York, in ancient times, had devised to them, by one Dalby, £400, to the intent to find a chantry in their church perpetually, and an obit for the soul of Dalby, and that the chantry priest should have forty-eight marks yearly. King Henry IV. granted license to them to purchase those houses in Fleet Street and other lands in York, *ad onera et opera pietatis* in the will of Dalby mentioned to be performed ; whereupon they purchased the land, and made ordinances how the priest should be maintained, and agreed with the executors of Dalby for the finding him perpetually ; and it was found that the dean and chapter employed £8 for the maintenance of a priest, and other sums for the maintenance of an obit, and that the lands were, in the first of

thought convenient or proper. To give an instance of the little scruple with which this was done, Henry VIII., upon the judgment of præmunire against Cardinal Wolsey, then Archbishop of York, seized York House, the town residence of that see, and ever after it remained in the crown; the bishop who succeeded having a right to no more than he was put in possession of, on the restitution of the temporalities. When the Reformation had begun, this practice of plundering the possessions of bishops became more common, owing to the delinquency many incurred by non-conforming with the new establishment, and the color thereby furnished of seizing the whole or part under the motion of forfeiture.

Edward VI., certified to be employed for a chantry; and the king had taken it as chantry land, and given it to Sir Edward Montague, who let to the defendant, and the dean and chapter entered, and let to the plaintiff. And it was contended that it was a chantry and given to the king, and two judges so held. But the other judges held the contrary, because there was not any lands given to Dalby, and his interest could not make a chantry; and the dean and chapter did not make a chantry nor appoint any lands thereto, but bound these lands for the payment of an annual sum to a priest; and that sum which was paid was not paid out of the lands only, but out of all their possessions; and when no lands certain were given for the purpose nor employed for that purpose, there were no reasons why they should be given to the king (*Holloway v. Watkins*, Cro. Jac., 51). In the reign of Charles II. this case arose: Stroud, in the time of Henry VII., being seized of land in fee, made a feoffment to use of his last will, and afterwards made his will, and devised certain lands to the Dean of Newark, in Leicester, for an obit; and the residue now in question to the chantry priest of Stroud's chantry, £7 per annum, during the life of his wife and Edith his sister, to chant for his soul and the soul of his ancestors; and the residue of the profits, if any, to Edith his sister. And after the death of his wife and sister, to perform divine service for ninety-nine years, and then that the land should be sold and the money distributed in charitable uses for the souls of the aforesaid persons. The feoffees made feoffment over, rendering to the chantry priest £7 per annum for ninety-nine years. And then came the Statute of Chantries; and if upon this matter the fee-simple should be forfeited, or only the lease, was the question. And it was held, that not only the lease, which did not determine until 7 Charles I., but also the fee-simple was to be forfeited, for it was a disposition of the lands with intent to maintain a priest, and was a superstitious foundation, and so forfeited under the statute, and that a conveyance to such uses was sufficient to forfeit the lands without an actual employment to such uses. The court put the objection, that if all lands given to superstitious uses should be forfeited, all the church land in England would be forfeited; but they met it thus, that lands given to a priest, *quatenus* parish priest, to chant mass, was not forfeited by the statute, but those lands which were given to him as a private chantry priest, as to chant mass at such an altar for the soul of the donor or ancestor, or pray for other private persons, should be forfeited (*Waldron v. Ward*, 2 Sid., 46; *Adam Lambert's Case*, 4 Coke, 115; *Pit v. James*, Hobart, 122; *Chien's Case*, 10 Litt., 392).

This was one way in which the church was plundered ; but this was involuntary. There was another practised by the churchmen themselves, which had very much increased of late, from the circumstances of the times. The clergy in Queen Mary's time, particularly the bishops, foreseeing a Protestant succession would soon take place, were resolved to make the most of their present possession, and exercised the full extent of that power over their ecclesiastical property which was allowed them by the law, in letting long leases, and otherwise incumbering it, little solicitous how much they dilapidated the revenues of their successors. Bishop Gardiner made no scruple of boasting of this practice, and used to say, in allusion to the length of his leases, that he should be a bishop a hundred years after he was dead. Abuse like this called for some remedy ; and accordingly, several provisions were made by parliament, which have since been known by the appellation of *the restraining statutes*.

These we shall mention in the order in which they were made. The first is stat. 1 Elizabeth, c. 19, and relates only to bishops. This act having enabled the crown (which power was heretofore exercised by the king without such a parliamentary sanction), upon the vacancy of any archbishopric or bishopric, to take into its possession as much of its lands as amounts to the value of the parsonages appropriate, and tenths within the same belonging to the crown, so that an exchange shall in that manner be effected, in order that the said revenue of tenths and impropriate benefices might be in the governance and disposition of the clergy ; having made this regulation, the statute further ordains as follows : that all gifts, grants, feoffments, fines, or other conveyance, or estate, by any archbishop or bishop, of any honors, castles, manors, lands, tenements, or other hereditaments, parcel of the possession of his see, to any person or body corporate, *other than the queen and her successors*, whereby an estate should pass, other than for the term of twenty-one years, or three lives, from the commencement of it, and whereupon the old accustomed yearly rent or more shall be reserved, and payable during the twenty-one years or three lives, shall be void. The reservation in favor of alienations to the queen was probably only meant to be in aid of the provisions in the first part of this act just mentioned.

This subject was taken up again in another way, and extended beyond the bishops to other ecclesiastical persons by stat. 13 Elizabeth, c. 10. This act contains two provisions, one to make ineffectual all conveyances by beneficed persons to defeat the remedy which the law gives against their executors for dilapidations; the other to put a restraint upon the leases of other spiritual men similar to that imposed on those of bishops. In the first place, it is enacted, that if any archbishop, bishop, dean, archdeacon, provost, treasurer, chaunter, chancellor, prebendary, or any other having a dignity or office in a cathedral or collegiate church; or if any parson, vicar, or other incumbent of any ecclesiastical living, to which belongs any house or building which he ought to maintain in repair; if any such person make a deed of gift, or alienation of his movable goods and chattels for the above-mentioned purpose, the successor may commence a suit against the person to whom the deed is made in the ecclesiastical court for the dilapidations, in the same manner as he might against him if he were the executor.

And, secondly, because long leases were the chief cause of dilapidations and the impoverishing of successors, it was enacted that all leases, gifts, grants, feoffments, conveyances, or estates by the master and fellows of a college, dean and chapter of a cathedral or collegiate church, master or guardian of an hospital, parson, vicar, or any other having a spiritual living (*a*) (other than for the term of twenty-one years, or three lives, from the time any such lease or grant shall be made, whereupon the accustomed yearly rent or more shall be reserved, and payable yearly during the term) shall be void.

This act is followed by another, made in the same sessions,¹ in order "to prevent livings appointed for ecclesiastical ministers being transferred by corrupt and indirect dealings to other uses." It enacts that no lease of any benefice, or ecclesiastical promotion with cure, nor of any part thereof, not being impropriated, shall endure any longer

(*a*) It was held that bishops were not included under these general words, for that it was not to be presumed that parliament would express the greater dignitaries after the lesser in mere general words,—an important principle of statutable construction (*Golds.*, 171; *Godb.*, 395; 1 *Jones*, 186; *Archbishop of Canterbury's Case*, 2 *Coke's Reps.*, 47).

¹ 13 Eliz., c. 20.

than while the lessor shall be ordinarily resident and serving the cure (a), without absence above eighty days in one year, but shall immediately upon such absence become void (b). The incumbent is also to forfeit one year's value of his benefice to the poor. To abolish a charge which had been imposed on many of the clergy by the zeal of the reformers, that of providing for exhibitioners at the university, and other persons out of their livings, it is enacted that the charging benefices with cure with any pension or profit shall be void. However, it is provided, notwithstanding the former clause of this act, that a parson who may by law hold two benefices, may devise that on which he does not usually reside to his curate, which, however, is only to endure as long as the curate resides, without absenting himself for forty days in one year.

These two acts of 13 Elizabeth were explained by stat. 14 Elizabeth, c. 11. As to the last of them, it was thought that bonds and covenants to enjoy land, not being leases, were not within the restriction of the statute; wherefore it is declared,¹ that all bonds, contracts, covenants, and promises, and by stat. 43 Elizabeth, c. 9, all judgments for permitting any enjoyment of a benefice with cure, or to take the profits, shall be adjudged of the same force as leases; and the like engagements made by curates are to

(a) Upon this statute, it was held that a lease, made during a term for years for three lives, reserving the ancient rent, was void, even although confirmed by the dean and chapter, and did not bind the bishop's successors (*Master v. Wright*, *Cro. Eliz.*, 141). And the principal reason was that, by the words of the statute upon leases made by bishops, the ancient rent must be reserved, and yearly payable; and in this case the rent reserved in the grant for lives in reversion, although due, could not be recovered by the successor during the lease for years, not by distress or action of debt, being reserved upon a lease for life, nor by assize, for he had no seisin (*Ibid.*); and so it could not be due or payable according to the statute.

(b) Upon this statute it was held that the death of a parson was non-residency within the meaning of the statute, so as to avoid a lease. A parson made a lease of lands usually let, reserving the ancient rent. The patron and ordinary confirmed the lease. The lessee let part of the term to the defendant; and then the parson died, and his successor entered and let to the defendant again, when the first lessee brought action for rent, and he pleaded the statute. And it was held that the lease was void by the death of the incumbent; for that the statute was meant to provide against dilapidations, and for the maintenance of hospitality; and therefore the leases were void, not only for non-residency, but for death or resignation; for otherwise dilapidations shall be in the time of the successor, and he cannot maintain hospitality (*Mott v. Hales*, *Cro. Eliz.*, 123).

¹ Sect. 15.

be considered in the same light as demises.¹ Again, as to that clause of 13 Elizabeth, c. 10, which concerns leases, it is declared,² that it shall not be construed to extend to houses, or ground belonging to houses, situated in the city, borough, town corporate, or market-town, or the suburbs of them, so as it be not the capital or dwelling-house for the habitation of such ecclesiastical persons, nor have above ten acres of ground belonging to it. But leases may be made of such houses as before the stat. 13 Elizabeth, c. 10. However, they are not permitted by this statute³ to make them in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparations, nor for longer term than forty years at the most; nor are any houses permitted to be aliened, unless there be, in recompense thereof, an assurance made of lands of as good value, and of as great yearly value at the least, in fee-simple.⁴ It is, moreover, declared that all money recovered by sentence, composition, or otherwise, for dilapidations, shall, within two years after the receipt thereof, be employed on the buildings in respect of which it was recovered, on pain of forfeiting double as much as is not so employed.⁵

The next act in the statute-book concerning college leases is stat. 18 Elizabeth, c. 6, for maintenance of the colleges in the universities, and of Winchester and Eton; which is followed by another in the same sessions, stat. 18 Elizabeth, c. 11, intended to explain further the stat. 13 Elizabeth, c. 10 and 20, concerning dilapidations and leases, which we shall first take notice of as more intimately connected with what has gone before, and close this subject with the former of these two acts. It seems that many persons had availed themselves of the letter of stat. 13 Elizabeth, c. 10, to defeat the spirit of it, and had made leases for twenty-one years, or three lives, long before the expiration of former years. It is therefore declared, that all leases of spiritual or collegiate lands, whereof any former lease for years is in being, not to be expired, surrendered, or ended within three years next after the making of any such new lease, shall be void. And, moreover, the same provision which had been made by stat. 14 Elizabeth, c. 11, to prevent an invasion of the stat. 13

¹ Sect. 16.² Sect. 17.³ 14 Eliz., c. 11.⁴ Sect. 19.⁵ Sect. 18.

Elizabeth, c. 20, respecting leases of benefices, with cure, was now adopted in the present instance; and every bond and covenant for renewing or making of any lease contrary to the true intent of this act, or of 13 Elizabeth, c. 10, is made void. Thus far as to an explanation of stat. 13 Elizabeth, c. 10.

Next, as to the stat. 13 Elizabeth, c. 20, to enforce the forfeiture there inflicted on the incumbent of one year's profit, to be distributed among the poor of the parish, it is ordained,¹ that after complaint to the ordinary, he shall, within two months after sentence, upon the request of the churchwardens, grant the sequestration of such profits to such inhabitants of the parish as he shall think convenient; and upon the ordinary's default, then every parishioner may retain his tithes, and the churchwardens may enter and take the profits of the glebe-lands and other rents and duties, until the ordinary grants sequestration; and then to yield account to the sequestrators, who are to distribute the profits to the poor, according to the directions of the act, under pain of forfeiting double the value of such as is withholden, to be recovered in the spiritual court.²

The last act is stat. 18 Elizabeth, c. 6, which relates to the mode of paying the rent upon some of the leases before described. This was made for the better maintenance, as the act says, and the better relief, of scholars, in the universities, and those of Eton and Winchester; and is said to have been devised by Sir Thomas Smith. It enacts, that no master, provost, president, warden, dean, governor, rector, or chief ruler of any college, cathedral church, hall, or house of learning in the universities; nor the provost, warden, or other head officer of the colleges of Eton or Winchester, shall make a lease of any farm, or lands, tenements, or other hereditaments, to which any tithes, arable land, meadow, or pasture appertains, except one-third part at the least of the old rent be reserved and paid in corn, that is, in good wheat, at 6s. 8d. the quarter or under, and good malt at 5s., to be delivered yearly, at days prefixed at the said colleges; and in default, to pay in ready money, at the election of the lessees, after the rate at which the best wheat and malt in the markets of

¹ Sect. 7.

² Ibid.

Cambridge, Oxford, Winchester, and Windsor, for the respective neighboring colleges, is sold the next market-day before the rent is due; and all other leases to be void. The wheat, malt, or money coming of the same, to the use of the relief of the commons and diet of the colleges: and by no fraud or color to be let or sold away, under pain of deprivation of the governor and chief rulers of the college, and all others consenting. These are provisions made for protecting ecclesiastical and eleemosynary corporations from dilapidating their possessions, and anticipating the profits of their successors by long and ruinous leases.

There were some alterations made in the rights of persons and of property during this reign, which now come under consideration. That which deserves our first notice is the law against *bankrupts* (a), which took up that matter

(a) Scarcely any subject has given rise to more legislation than this of bankruptcy, and there is none upon which it is of more importance to understand the principles and objects involved, which on this, as on so many other subjects, may best perhaps be gathered from the earlier statutes on the subject rather than in others more complicated, and confused by multitudinous directory provisions. And possibly it may be found that in the earlier statutes the true principles are to be found, which later legislation may have tended only to obscure. It has already been seen that in the first statute of Henry VIII. the leading principles were laid down, that in cases where trader-debtors evaded their creditors by withdrawing their persons or their assets from legal process (the only remedy for which at common law was outlawry), there ought to be a summary procedure for seizure of the assets, and their equal distribution among the creditors. But that act, which only said that the chancellor, etc., should take order in the matter, and made no provision for machinery, proved, probably for that reason, of little practical use, and this was the first great lesson taught by the legislation on the subject, that the machinery for carrying out the object is practically everything. The next great lesson to be learned is that which is conveyed in the present statute, as the result, no doubt, of some practical experience, and the observation and consideration of the great lawyers of that age, that the best course of procedure is to let the creditors, as much as possible, administer the law themselves, merely resorting to judicial tribunals to determine any disputed questions of right or property which might arise respecting the estate of the bankrupt, with strangers or particular creditors. For it will be observed that this statute provided that the machinery should be in each case by commission to "honest and discreet persons to take order with the bankrupt's estate, i. e., collect and distribute it," and these persons no doubt were intended to be, as they naturally would be, and in fact were, creditors, who, of course, would be most interested in a speedy collection and distribution of the assets, leaving questions of right or property arising between them and others, whether particular creditors or strangers, to be settled by the ordinary courts of law or equity, as the case might be. The authority to administer the estate would be that of the creditors, acting under the commission; and thus a commission in each case is a domestic body, without the cumbrous machinery and formal procedure of a court. In the first case

in a different way from that in which it had been treated in the time of Henry VIII., and laid the basis of that system which has since been framed concerning this description of persons.

This act is stat. 13 Elizabeth, c. 7, which complains, that notwithstanding stat. 34 and 35 Henry VIII., c. 4, those kind of persons had much increased: it was, therefore, necessary to make better provision for suppressing them, and to declare plainly who is and ought to be deemed a bankrupt, which it does in a very full manner; for it enacts, if any merchant or other person using or exercising the trade of merchandise, by way of bargaining, exchange, re-change, bartry, chevi-

which appears to have arisen for a court of law under this act—the “Case of Bankrupts” reported by Lord Coke—the question being between the commissioners and a particular creditor as to a part of the estates, the statute was thus expounded and explained: “First, the act describes a bankrupt, and whom he defrauds, *i. e.*, the creditors; next, to whom they should complain, *i. e.*, to the Lord Chancellor; third, how, and by what way relief is to be provided, *i. e.*, by force of a commission under the great seal; fourth, the authority of the commissioners, *i. e.*, to sell and distribute to every one of the creditors a portion, rate and rate alike, according to the quantity of his or their debt. So that the intent of the makers of the act, expressed in plain words, was to relieve the creditors of the bankrupt equally, and that there should be an equal and ratable proportion observed in the distribution of the bankrupt’s goods among the creditors, having regard to the quantity of their several debts, so that one should not prevent the other, but all should be in *equali jure*. And so in divers cases, as well at the common law as upon like statutes, such constructions have been made, and at common law an equality is required; so here there ought to be an equal distribution *secundum quantitatem debitorum suorum*; but if after the debtor becomes a bankrupt, he may prefer one (who peradventure hath least need), and defeat and defraud many other poor men of their true debts, it would be unequal and unconscionable, and a great defect in the law, if after he hath utterly discredited himself by becoming a bankrupt, the law should credit him to make distribution of his goods to whom he pleased, being a bankrupt man of no credit; but the law hath appointed certain commissioners of indifferency and credit to make the distribution of his goods. And by the statute, although the commission was after the man became bankrupt, yet the commissioners should have the goods. And the proviso concerning gifts and grants, *bond fide* made, would make no gifts or grants good which the bankrupt made after he became bankrupt, but only excluded them out of the penalty inflicted by the statute (*Case of Bankrupts*, 2 *Coke’s Reps.*, 24). It will be observed that the court said the statute appointed “commissioners of indifferency and credit” to make distribution, which meant, persons not interested in an unfair distribution of the estate, as particular friends, creditors would be, but persons only interested in a just and equal distribution, such as the law was designed to secure. And this of course would not exclude fair creditors, who would have the best interest in seeing to a prompt and just distribution of the estate; and, on the other hand, would appear rather to point to them.

sance, or otherwise, in gross or by retail; or seeking his trade of living by buying and selling, and being a subject born, or denizen; if any person of that description depart the realm, or begin to keep his house, or otherwise to absent himself, or take sanctuary, or suffer himself willingly to be arrested for any debt or other thing not due for any just cause or good considerations; or suffer himself to be outlawed, or yield himself to prison, or depart from his dwelling-house, to the intent to defraud or hinder any of his creditors, being a subject born, of his just debt or duty, shall be taken for a bankrupt.

And for the management of such a person's affairs for the benefit of his creditors, there is power given to the Lord Chancellor, upon complaint in writing, to appoint by commission, such wise and honest discreet persons as to him shall seem good, who are to take order and direction with the body of the bankrupt, and also with his money, goods, debts, and chattels; and such lands, tenements, and hereditaments which he had when he became bankrupt; in his own right, or jointly with his wife or children, to his own use; or with any other person, for such interest as he may lawfully depart withal. And by deed indented and enrolled in one of the queen's courts of record, to sell or otherwise to order for the payment of his debts; that is to every creditor a ratable portion according to his debt. And the commissioners are, upon the bankrupt's request, to make a true declaration of the manner in which they have bestowed his effects.¹

If complaint is made to the commissioners by any party grieved, that the effects of the bankrupt are in the possession of any one, or that any person is indebted to the bankrupt, they may send for, by such process, ways, and means as they in their discretions shall think convenient, and examine them, upon oath or otherwise, concerning the same.² And if they do not disclose, upon their examination, the whole truth, or deny to swear, they shall forfeit double the value of the thing so secreted, to be levied by the commissioners, of the lands, goods, and chattels, in such manner as was before appointed for the principal *offender*, as the bankrupt is called, to be distributed for the payment of the bankrupt's debts.³ And

¹ Sect. 4.² Sect. 5.³ Sect. 6.

if any person fraudulently or by collusion, claim, demand, recover, possess, or detain any debts, duties, goods, chattels, lands, or tenements, by writing, trust, or otherwise, other than such as he can prove to be due, by right and conscience, on just consideration before the commissioners, he shall forfeit double the value of the thing in question,¹ to be employed as the before-mentioned forfeiture. If these forfeitures amount to more than enough to pay the bankrupt's debts, the overplus is to go, half to the queen, and half to the poor.²

If the bankrupt withdraw himself from his usual place of abode, the commissioners, upon complaint, may award five proclamations, to be made in the queen's name, on five market-days, near the bankrupt's house, commanding him to return and yield himself to the commissioners at a time and place appointed in the proclamation; and if he disobeys, he is to be adjudged out of the queen's protection, and every person who shall help to secrete him is to be imprisoned and fined as the chancellor (upon the information of the commissioners) shall think meet.³

If the creditors are not fully satisfied, they may have their remedy for the residue of their debts as if this act had not been made.⁴ And all future effects of the bankrupt, whether lands or goods, are to be appointed and sold by the commissioners for the satisfaction of his creditors.⁵ This act not to extend to any assurance of land made *bonâ fide* by the bankrupt, before the bankruptcy, not to the use of the bankrupt or his heirs; and where the parties to whose use it is made are not consenting to the fraudulent purpose of the bankrupt to deceive his creditors.⁶

This was the manner in which a bankrupt was dealt with; who was all through considered as an offender, was stripped of his property, both present and to come, and, after all, still left to the mercy of his unsatisfied creditors, without the least means of being likely to pay them.

The two statutes concerning fraudulent conveyances come next under consideration. Several acts had been formerly made on this subject,⁷ but none of them had gone so far as the following two to re-

¹ Sect. 7.⁴ Sect. 10.⁶ Sect. 12.² Sect. 8.⁵ Sect. 11.⁷ Stat. 50 Edw. III., c. 6; 3 Hen. VII., c. 4.³ Sect. 9.

strain these feigned gifts. The first is made in favor of *creditors*; the other in favor of purchasers. By stat. 13 Elizabeth, c. 5, it is complained, that gifts and conveyances are made of lands and goods, with intent to hinder or defraud creditors and others of their lawful demands; for prevention of which it is enacted, that every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods, and chattels, or of any of them; or of any lease, rent, common, or other profit or charge out of the same lands or goods, by writing or otherwise; and every bond, suit, judgment, and execution for any intent or purpose before declared, shall be deemed (only as against that person, his heirs, successors, executors, administrators, and assigns, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortmains, and reliefs, might be in anywise hindered, delayed, or defrauded by such fraudulent practices) void and of no effect (a). And all parties to such fraudulent conveyance, knowing it to be such, who shall put in use, avow, maintain, justify, or defend it, as made *bonâ fide*, and upon good consideration; or shall assign the lands or thing so conveyed, shall forfeit one year's value of the lands, and the whole value of the goods and chattels conveyed; and as much money as is contained in such feigned bond, half to the queen and half to the party grieved, to be recovered in any court of record.¹ This act is not to extend to any estate or interest, made *bonâ fide*, and upon consideration, to any person not knowing at the time of such fraud or collusion.

To avoid the like fraudulent conveyances, when made to deceive *purchasers*, it is enacted by stat. 27 Elizabeth, c. 4, that every conveyance, grant, charge, lease, estate, encumbrance, and limitation of uses, out of any lands, tenements, or other hereditaments whatsoever, for the intent to defraud such persons, bodies politic or corporate, as shall purchase in fee-simple, fee-tail, for life or years, the same lands, or any rent, profit, or commodity out of them, shall be deemed void, as against such purchasers, and all

(a) That is, only as against creditors, but not as against the party himself or his executors: for, as against them, it was deemed a good deed (*Hawes v. Leader*, Cro. Jac., 271; *Yelv.*, 196). This is to be observed as a most important principle, which has ever since been applied to all similar enactments.

¹ Sect. 3.

persons claiming under them. This is confined only to *real property*; and there is the same penalty on parties to such practices who are privy to the fraud, and on those who defend the conveyance, as was inflicted by the last statute,¹ in the very words of that act; and a like clause in favor of those who have taken any estate *bonâ fide*, and upon good consideration,² only there is no mention of the requisite added in the former act, that they should not know of the intended fraud. No lawful mortgage made *bonâ fide*, upon good consideration, is to be impeached by this act.³

It is enacted that where a person has made a conveyance, with a clause of revocation at his will or pleasure, and shall afterwards convey or charge the same lands (the first conveyance not being revoked), such former conveyance, as against the said vendees or grantees, shall be void.⁴ It is also provided, in order to make such transactions notorious, that statutes merchant and staple shall, within six months, be entered in the office of the clerk of the recognizances established by stat. 23 Henry VIII., c. 6. Statutes not so entered are to be void against all such as shall purchase for good consideration the lands which were liable to them.

¶ If fraudulent conveyances deserved the notice of parliament, so did those feigned recoveries Recovery suffered by tenant for life. which were suffered by persons not having an inheritance in prejudice of those who stood in remainder or reversion (*a*). We have seen that, by stat. 32 Henry VIII., c. 31, a recovery had by assent of parties against the tenant for life was to be held void; but an opinion

(*a*) It was said in this reign by the court that a common recovery was by usage become a common assurance and conveyance of land, and that it was to be considered as a conveyance by consent. It was said, that common recoveries were so usual, and their form and order of proceeding so notorious, that the law took notice of them, and the judges had knowledge of them as recoveries by consent of the parties for assurance of lands (5 *Coke's Reps.*, 40). And the cases of *Winbush v. Talboys* (*Plowd.*, Cases, 56), *Stowell v. Lord Zouch* (*Ibid.*, 515), we recited as expounding their nature, and it was laid down, "that the common usage in the case of recoveries was to be allowed, and that in them the intent of the parties was to be observed" (*Ibid.*, 41). But this only applied to a fair and honest use of recoveries as means of conveyance: for if, on the one hand, they were allowed to be used as conveyances, on the other hand, it was just that they should be subject to the same risks as conveyances, one of which was (*vide ante*) that a fraudulent deed was void as against the parties.

¹ 13 Eliz., c. 5.² Sect. 4.³ Sect. 6.⁴ Sect. 5.

had prevailed concerning that statute which had opened a way for evading it. It was held, that if tenant for life made a lease for years, and the lessee for years had made a feoffment in fee, and the feoffee had suffered a common recovery in which the tenant for life was vouched, this was out of the purview of the statute, because the tenant was not seized for life, but had only a right, and because he in remainder had only a right, for all was divested by the feoffment. It was judged necessary to prevent such covinous recoveries effectually, and to extend the restriction to those who had even something more than an estate for life. It was therefore enacted by stat. 14 Elizabeth, c. 8, that all recoveries had or prosecuted by agreement of the parties against tenants by the courtesy, tenants in tail after possibility of issue extinct, or for term of life or lives, or of estates determinable on a life or lives, or against any other, with voucher over such particular tenant, or of any having, or that had right or title to any such particular estate, shall be utterly void as against those entitled in reversion or remainder; though a recovery had by these particular tenants with assent of him in reversion or remainder, so as such assent appear of record, shall be notwithstanding good.

The decision in the time of Queen Mary, that an entail in use might be barred by recovery, did not so thoroughly close that question as not to leave a pretence of argument against it; and we accordingly find it argued, amongst other points, very strenuously by Plowden, in *Mansel's* case, in the early part of this reign, that a recovery could not bind an estate-tail of a use. The decision in this cause is not known,¹ but it seems to have been taken for established law all through this reign that a use might be barred the same as an estate in possession.

Recoveries,
effect of.

In the course of this long reign many points arose upon the nature and effect of a common recovery, which had now grown to be the usual method of conveyance where the granter was seized in tail, and was applied in other instances where some contingent claim or latent title was to be barred. Thus, when a tenant in tail was married, a recovery was as necessary to bar the wife of her dower

¹ Plowd., Mansell's Case.

as to bar the issue; and in such cases the writ used to be brought against the husband and wife jointly, or they were vouched jointly. A recovery of the former kind was suffered, and the wife surviving the husband, it was long argued that, because the wife was named joint-tenant and vouched as such, and as she survived, the recompense should be construed to go to her; it was therefore concluded that the issue were not barred. But it was determined that the wife should be understood to have been named only to bar her of her dower; which, therefore, should be barred by the recovery as well as the estate-tail.¹

In the 23d year of the queen, two very important cases were determined on the nature of a recovery. The one was *Capel's* and the other *Shelley's* case. The former was thus: a tenant in tail in remainder had granted a rent-charge issuing out of the land entailed; afterwards the tenant in tail in possession suffered a recovery, and died without issue; and the granter being the next remainderman, the grantee distrained for the rent, and it was resolved by all the judges that the recoverer, and those who came in under their estate, should not be subject to the charge of him in remainder; and this decision they grounded on three reasons—1st, because a lease or rent granted by him in possession being good and lawful, it was impossible that a similar charge made by the remainder should stand with it *simul et semel*; 2dly, because it is a condition tacitly annexed to all such grants by remainder-men, that they are not to take effect till the remainder comes into possession; 3dly, because the grantee of the rent-charge could not falsify the recovery in the present case.²

Shelley's case was a cause that long engaged the attention of lawyers. The principal point turned upon the execution of a recovery, and this involved other considerations which do not exactly relate to the present inquiry; but on this, as on former occasions, we shall not think ourselves so rigidly bound to method, but that we may make the institutional and systematic submit to the historical; and, therefore, considering this case as a very important fact, we shall mention it at large, notwithstanding some parts of it may not

¹ *Ease v. Snow*, 20 Eliz. Plowd., 514.

² 1 Rep., 61.

contribute to illustrate the nature of recoveries. The circumstances of this case were as follows: Edward Shelley had issue an elder son, and a younger named Richard; the eldest died leaving a daughter, his wife *enceinte* with a son, named afterwards Henry. Edward, being tenant in tail, covenanted to suffer a recovery to the use of himself for life, remainder to certain persons for twenty-four years, remainder to the heirs male of the body of the said Edward, and of the heirs male of the bodies of such heirs male, with remainder over. Edward died between five and six o'clock in the morning of the first day of the term; the same day the recovery passed, and immediately after judgment an *haberes facias seisinam* was awarded, and ten days after the recovery was executed, and two months after the wife of the eldest son was delivered of Henry. The land was in lease for years at the time of the recovery. Richard, the uncle, entered, and Henry entered upon him. And the question was, whether this entry of Henry upon his uncle was lawful; and this depended on the point whether Richard was in by descent or purchase. The business of Richard was to argue that he was in by purchase, and of Henry that Richard was in by descent.

To make way for Richard to claim by purchase under the new settlement, it was necessary for him to show that the recovery had been completed so as to bar the first entail. They therefore argued that execution might be sued against the issue in tail, because the judgment being against the tenant, and for the tenant to have in value against the vouchee, the right of the estate-tail shall be bound by the judgment and not by the execution; but as the land was in lease, they held the recoverers had not the reversion presently by the judgment before execution; and then, thirdly, to show Richard was in by purchase, they contended that what vested originally in the heir, and was never in the ancestor, vests in the heir by purchase, and the use in question vested originally in Richard, and was never in Edward, therefore they concluded Richard took it by purchase. To prove the minor proposition, they said no use could be raised before the recovery executed, for the use arises out of the estate of the recoverers, and not being executed in the life of Edward, no use could arise during his life, and it was impossible he should be in by descent, for no use, right,

title, or any other thing touching the uses descended to him, but only a thing intended, and they said it was like the case in 9 Henry VII.,¹ where a condition descends to a daughter, and she enters for the condition broken; and the son, born afterwards, shall never enter on her there, although she is in by descent, yet because she was the first in whom it vested, the posthumous son shall not divest it. And further, they contended that, notwithstanding the recovery had been executed in the life of Edward, yet ought Richard to take by purchase as *heir male of the body of Edward Shelley*, for the subsequent words, "*and of the heirs male of their bodies*," being words of limitation, have nothing to attach upon, and so can have no sense or meaning, unless the first are construed to be words of purchase.²

The conclusions founded on these three points were combated by the counsel for Henry, whose title was to be supported by maintaining the direct contrary. First, therefore, they laid it down for law that execution could not be sued against the issue; and, therefore, the issue not being barred, Henry was entitled under the first entail. As it was agreed, on the other side, that the judgment only against the tenant did not bind the issue, but the judgment to recover in value, they argued from this concession that the issue were not barred, for they could not have any recompense in this case, because execution could not be sued against themselves, and they were not entitled to recompense in value till execution was sued against them. Now, execution could not be sued against them, because, as they claimed by a title paramount to recovery, they could not be bound by it, though he would, if execution was sued in the life of the tenant, because then he would be entitled to execution over. And they said it was the same in a fine; if the issue were remitted before all the proclamations passed, they were not barred, notwithstanding the very express words of stat. 32 Henry VIII. Several cases were quoted to prove that, upon a feigned recovery against the father, execution could not be sued against the issue in tail.

As to the second point, they said, if it was necessary execution should be had in the life of Edward, that it was

¹ 9 Hen. VII., 25 a.

² 1 Rep., 93-95.

executed by the judgment of law; for, as the recoverers cannot, they said, sue execution against the lessee for years, they shall be adjudged by law in execution presently; and this was the difference between lands in possession of the tenant at the time, and those in lease for years. They concluded, therefore, that if the judgment was thus executed by operation of law, then the estate-tail to the heirs male of his body was in Edward Shelley, and consequently the entry of Henry was lawful.

But admitting the first two points to be against Henry; yet, they contended, that supposing execution might be sued against the issue, and the recovery was not executed in the life of Edward, the entry of Henry was lawful, which was the third and great point in the cause; and for this they had six reasons, which were shortly these: 1st, When it became impossible, by the act of God, that execution should be sued against Edward, no person who otherwise would have received a benefit shall be prejudiced thereby. 2dly, Then they laid it down as a rule, that where the heir takes anything that might have vested in the ancestor, the heir should be *in* by descent, and here the use might have vested in Edward; and as Richard, in that case, would have taken the use in the course and nature of descent, he should take it in the same course now. And they said, in answer to what had been alleged, that though this was neither a right, title, or use, but only a possibility of a use, yet if, on performance of a condition, it might have vested in the ancestor, it should rest in the son by descent; and they denied the case 9 Henry VII. should be understood as stated: for if the daughter had paid any sum of money, perhaps the law would allow her to detain the land, upon the principle that *qui sentit onus, sentire debet et commodum*; yet, if the condition was performed by the feoffee, the law was clearly otherwise, namely, that the son might enter.

Further, 3dly, they said, the execution of the use should relate back to the recovery, and the indenture of covenant, which was the *fons et origo* of the settlement, or, as they called it, *the mother*, which conceived the use; and as it is all one transaction, the law will regard the original act. If the indenture is to have this influence, in point of time, so might it in point of direction and limitation of the estate; and they direct that, after the death of Edward, the heirs male of his body should have the land, and these words

give it by way of limitation of estate, and not by way of purchase; so that Richard must take by descent.

4thly, In addition to this, they said, it should be considered that this was a use, and uses had always been governed by the intention of the parties; and they said, it appeared from many circumstances, that Edward meant the son of his eldest son should be benefited; and, amongst others, the general term, *heir male*, would not have been used if it had been designed to go to the uncle. They thought, upon the face of this deed, the eldest son's son would have had the subpoena at common law, and from thence they concluded he should be entitled to the execution of the use; and to this may be added, that the stat. 27 Henry VIII. speaks of trusts and confidences; so that although no use arose in the life of Edward, yet there was a trust and confidence expressed in his life; and when the use was once raised, it ought to vest according to the trust and confidence declared in the indentures.

5thly, If the vesting of the use was not to depend on the indentures and recovery, but on the suing of execution, it would make the whole settlement depend on the will, first of the recoverers, who were intended only as instruments, and, in the next place, upon the sheriff and his officers, who might hasten or retard the execution of the writ as they pleased, which would lead to infinite absurdities, which the law would never endure.

6th, and lastly, it was argued, that the uncle could not take by purchase as *heir male of the body of Edward*, because a daughter of the eldest son was alive, and *heir general*; and though he might take as *heir male* by descent to the exclusion of her, *per formam doni*, yet he could not take by purchase, and this distinction they supported by an opinion in 9 Henry VI.¹ of a remainder to heirs female of the body of *T. S.*, and *T. S.* had a son and a daughter: and by another in 37 Henry VIII.² of a remainder of gavelkindlands to the right heirs of *T. S.* And when the other side contended this was helped by the statute *de donis*, they said, that act made no estates-tail, which were not before fees conditional; and if a remainder had been limited in this way, before the statute, the uncle could not take in the life of the daughter of the eldest son.

¹ 9 Hen. VI., 24.

² Bro. done, 42.

In answer to what had been alleged on the other side, that *heirs male of the body of the heirs male* must make the first *heirs male* a purchaser, or they would have no sense or effect, they laid down this old rule of law, that where an ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs in fee or in tail, then *heirs* are words of limitation, and not words of purchase; and this they supported by the *Provost of Beverley's case*,¹ and other causes so far back as the reign of Edward III. Therefore, in this case, as Edward took an estate of freehold, the *heirs male* must take by descent, and if they were construed words of purchase, then all the heirs male of Edward, if not also heirs male of Richard, would be excluded, which would be contrary to the express limitation of the deed. Their construction, therefore, of the words was, that the former include the latter, so that *heirs male of the body* were only declaratory of the former, and do not at all restrain them. And, further, they said, if Richard did not take by descent, he could not take at all; for where an estate is given to a man, and in the same deed there is a limitation to his heirs, the heir takes by descent, and not by purchase; and if the first person does not take, the heirs cannot take at all; for which, among others, they founded themselves on *Bret v. Rigden*, where the devisee for life dying in the life of the testator, the heir of the devisee was not allowed to take by purchase, and could not take by descent what never was in his ancestor; therefore he took nothing.

This was the substance of the arguments used on both sides in this famous cause, which was argued three several days in the Court of King's Bench; when the queen, to prevent further litigation, sent letters to the Lord Chancellor Bromley, requiring him to summon all the judges before him, to have their opinion upon the points in question. At the first argument, the chancellor declared his opinion upon the third point in favor of Henry. After one or two more meetings, the judges, with the dissent of a puisne judge of the common pleas, delivered their opinion, that the entry of Henry was lawful. And when this opinion was delivered in court by Sir Christopher Wray,

¹ 40 Edw. III., 9.

and he was pressed by the counsel for Henry for the reasons of the judgment, he said, that on the first point, the *better* and greater part of the judges held, that execution might be sued against the issue, because the right of the entail was bound by the judgment. As to the second, they agreed, that the reversion was not in the recoverers immediately by the judgment; and as to the third, they all agreed, except one judge of the common pleas, that the uncle was *in*, in course and nature of a descent, though he should not have his age, nor be in ward, etc., and for this they gave four reasons: 1st, because the original act, namely, the recovery, out of which all the uses and estates had their essence, was had in the lifetime of Edward, to which the execution after had a retrospect; 2dly, because the use and possession might have vested in Edward, if execution had been sued in his lifetime; 3dly, because neither the recoverers by their entry, nor the sheriff by doing execution, could make whom they pleased inherit; 4thly, because the uncle claimed the use by force of the recovery and indentures, by words of limitation, and not by words of purchase; and these were the principal reasons of the judgment; and it was resolved by them all, that notwithstanding the death of Edward, between five and six in the morning of the same day, yet the recovery was good.

Towards the close of this reign, a case, very much like this, was determined in a manner that tended to the construction of this rule, extremely exact and defined. This was of a devise for life to A., and afterwards to the next heir male of A., and to the heirs male of the body of such next heir male. This was *Archer's case*. And there it was agreed by the whole Court of Common Pleas, that A. took but an estate for life; for he had an express estate for life devised to him, and the remainder is limited to the next heir male in the singular number. And they held the remainder good, although A. cannot have an heir during his life, for it is sufficient that the remainder vests *eo instanti* that the particular estate determines; and further (which was the principal point in this cause), it was held that the feoffment of A. destroyed the remainder to his right heirs, because every contingent remainder ought to vest either during the particular estate, or *eo instanti* that it determines; now here the estate for life determined by a condition in law an-

nexed to it, and there can be no heir of A. during his life, therefore it is wholly gone,¹ which point had been agreed by Popham and the other justices in *Chudleigh's* case.² This case, therefore, deserves great notice, not only for what Coke calls the principal point, namely, the feoffment of tenant for life destroying the contingent remainder, but also for the above opinion on the limitation to the *heir* in the singular number. These repeated opinions concerning the distinction of remainders by the feoffment of tenant for life, and to the devise which was introduced some years after, of giving an estate to certain trustees next to the tenant for life; who, upon the forfeiture of his estate by alienation, became entitled to enter, and so preserved the contingent remainders that were afterwards to arise. This was particularly necessary in all marriage settlements, where the husband had only an estate for life, and a remainder being limited, as in the present case, to the *heir* or *eldest son*; for in the latter case he might destroy the remainder before a child was born, and in the former he might bar it at any time, for there is no such person as *heir* during the life of the ancestor.

But where a man and his wife were seized in tail, with remainder over, and a recovery was had against the husband alone, it was resolved that it should not bind the remainder; for between husband and wife there are no moieties, and the husband had not power to sever the jointure, or dispose of any part of the land; so that the *præcipe* being brought against him alone, the recompense could not for any part enure to the estate-tail, or to the remainder; for to the whole estate it cannot enure, because the wife, who had a joint estate with him, was not party; and it cannot be good for a moiety, as there are no moieties between husband and wife, and the remainder depended upon the entire estate to the husband and wife, to which no recompense could enure on a recovery against the husband solely;³ and this reasoning they thought conformable with the decision in *Fullarum's* case. However, in *Cuppledike's* case, in the Court of Wards, where a man and his wife were seized to them and the heirs of the husband, and he alone was vouched in a common recovery, that the remainder was bound, notwithstanding the wife,

¹ Archer's Case, 40 Eliz., 1 Rep., 66.

² Ibid.

³ Owen v. Morgan, 27 Eliz., 3 Rep., 5.

who had an estate, was not vouched; for the husband came *in* in privity of the estate-tail, and the recovery in value goes to those in tail and in remainder. And they held where *A.* was tenant in tail, remainder to *B.* in tail, with divers remainders over; and *A.* made a feoffment, and the feoffee suffered a recovery in which *B.* was vouched; here *A.* was not bound, but *B.* and all those next in remainder; for, though by the feoffment all the remainders were discontinued, and converted to mere rights, yet in the case of a common recovery, which is a common assurance of land, he who comes in as vouchee shall, in judgment of law, be *in* in privity of the estate which he had, although the precedent estate, on which it depends, be divested or discontinued. So here, though the estate of the wife be not recontinued, yet the husband, as vouchee, shall, in judgment of law, be *in* of his estate-tail.¹

The construction of the statutes of Henry VIII., and that of the present reign, upon recoveries, occasioned some altercation in our courts. In *Wiseman's* case, a point arose upon stat. 34 and 35 Henry VIII., c. 20. A person covenanted to stand seized to several uses, with remainder in fee to the queen; and it was held that this remainder was barred by a recovery, notwithstanding the above act; for that only related to gifts made by the crown, or by the procurement of the crown; so that, in the first case, the reversion, and in the latter, the remainder in fee, was limited to the crown.² Again, where tenant for life bargained and sold the land, and the bargainee suffered a recovery, and vouched the tenant for life before stat. 14 Elizabeth, c. 8, it was argued in *Sir W. Pelham's* case, that this was no forfeiture within stat. 32 Henry VIII., c. 31, because the vouchee in this case was not seized for life, but came in only as vouchee; and it was further argued, that when the recovery was executed, the entry of him in remainder was tolled. But the Court of Exchequer resolved that this recovery was a forfeiture of the estate, for as a recovery was now become a common assurance, it was the same as if a fine had been levied, or a feoffment made, and was equally to the disherison of the heir. And, therefore, there was a difference between a recovery with assent, and one without, though without title. It was also re-

¹ 44 Eliz., 3 Rep., 6.

² 27 Eliz., 2 Rep., 15.

solved that the entry of him in remainder was congeable as well after execution as after judgment; for being a forfeiture, the suing execution could not toll the entry. And the court said it would be mischievous, if before stat. 14 Elizabeth, c. 8, it should be lawful for the tenant for life, by suffering a recovery, to toll the entry of him in reversion or remainder, and put them to a real action; and in proof of it being a forfeiture, they adduced many cases so far back as the beginning of the reign of Edward III., some of which also proved that the suing execution was not material.¹

The effect of a feoffment made by a tenant in tail was much debated in *Walsingham's* case, the arguments on which occasion went fully into the nature of the estates-tail and reversions. Sir Thomas Wiatt, being seized in tail of the gift of the crown, made a feoffment in fee, which feoffee enfeoffed the ancestor of Walsingham. Sir Thomas was attainted of treason in the last reign, and in addition to the operation of stat. 26 Henry VIII., c. 13, and 33 Henry VIII., c. 20, the forfeiture of all his estates was confirmed by statute, with a saving of the rights of strangers; and a bill of intrusion being brought against Walsingham, it became a great question what estate and right Sir Thomas had after the feoffment, and at the time of the treason committed; for if he had no right or title, the land could not come to the crown by forfeiture, for Walsingham's right was saved by the express provision of the act. It was agreed on both sides that the reversion was not divested out of the king by the feoffment, but that remained as before.

But, notwithstanding this concession, it was contended by the defendant's counsel, that the feoffment in fee, with livery, was such an act as conveyed out of Sir Thomas his whole estate and interest, and nothing was left behind to be forfeited. And it was objected that the estate-tail did not pass, and therefore must continue in Wiatt, they said that did not follow, for it might be that neither Wiatt nor the feoffee might have, but it might be in abeyance of law; and Littleton was of opinion that an estate-tail once made might be in abeyance; for, says he, if tenant in tail grants all his estate to another, the reversion in tail is

Feoffment by
tenant in tail.

¹ 32 Eliz., 1 Rep., 15.

not in the tenant, nor can he have an action of waste, because he has not the reversion,¹ and if he had it not in that case, much less has he it in this, for he gave it to the feoffee and his heirs; but Littleton says the estate-tail is in abeyance, and is like a grant for life, remainder to the right heirs of *T. S.*, where the tail is in abeyance during the life of *T. S.* And they said the estate given to the feoffee being not in tail, and being for more than his life, must be a fee-simple; but then a fee, determinable on the estate-tail, or determinable by the entry of the issue, which they might make after the death of Wiatt. And if the feoffee had one fee-simple and the king another, it was no uncommon thing for these to be two fees-simple. For before stat. 34 and 35 Henry VIII., if tenant in tail, the reversion in the king suffered a recovery, the recoverer had a fee-simple, determinable on the estate-tail, and the king his ancient fee-simple; and many other instances were quoted where there might be two fees-simple of the same land.

In answer to this, it was said that no other estates passed by the feoffment than for the life of Wiatt; and here it is not so material what words of limitation were used as what estate the law will suffer to pass; and as it was confessed that no fee-simple was divested out of the king, it follows almost of consequence that none passed to the feoffee, for none can give that which they have not; and there was no fee-simple in Wiatt, but only for his life, and the estate-tail could not pass to the feoffee, because none could have that but who are comprehended in the intent of the donor; nor could an estate for the life of the feoffee, for that also would discontinue the reversion in the king. If, therefore, neither a fee nor tail for life of the feoffee passed, it must be for the life of Wiatt, for such a one he might make, and then by Wiatt's death it ceases, and he became an intruder on the crown.

They denied the case in Littleton about abeyance to be law; for, as no other could possibly have the estate-tail, to what purpose should it be in abeyance? For an estate is in abeyance only where it cannot vest immediately, but may afterwards, as a remainder to the heirs of *T. S.*, who is alive. And what Littleton there says is contradicted

¹ Sect. 650.

by other passages in his book, as where tenant in tail leases for years, and afterwards releases to the lessee and his heirs; here nothing passes but for the life of tenant in tail. The same where he grants for his own life and releases.¹ And though it was true, as Littleton said, the tenant in tail shall not have waste, yet it was not because the grantee has a greater estate than the tenant in tail, but because the estate of tenant in tail is dispunishable of waste; and by the grant he had conveyed his privilege to do waste. So that the case in Littleton does not prove the tail is out of the tenant, or that the grantee has a greater estate than for the life of tenant in tail.

As to the stress that was laid on the word *heirs* in the grant to the feoffee, they said this did not make it an inheritance if the granter could not give one; but it gave descendable freehold during the life of Wiatt, and *heirs* was only inserted to prevent occupancy; for it did not amount to a fee-simple determinable, as he called it, that is, determinable on *T. S.* dying without issue, for such an estate, depending only on the failure of an estate of inheritance, they admitted to be a fee-simple, but yet a fee-simple determinable. And they inferred, from a case in 18 Edward III., that after this feoffment, reversion of the tail remained in Wiatt.

But however the law was as to the tenant in tail himself, and though he should not be permitted to say against his own feoffment that the estate-tail continued in him, yet they contended the crown may say that the estate-tail continued in Wiatt. And if the feoffment could not discontinue the reversion, no more should it divest the crown of any advantage it might have from the estate-tail continuing, so that it shall continue for the benefit of the king. And for support of this they quoted 21 Ass., 15, and 40 Ass., 36.

Plowden, who was one of the counsel on this occasion for the crown, made this last point a distinct consideration, namely, whether the entail should be said to be extinct, and the crown should have the land by way of reverter, or of forfeiture; and he contended she should have by reverter; for, considering stat. 26 Henry VIII., c. 13, how shall land be forfeited to the king and his heirs where he

¹ Litt., 606, 612.

had the fee-simple before? for this would make two fees-simple in the same person. And he contended that the king should hold it as in his ancient fee-simple, discharged of the entail, and all leases and incumbrances made by the tenant; and this was decided in *Austin's* case in the last reign, upon a lease made by the same Sir Thomas Wiatt.

The Court of Exchequer took a whole year to determine this matter: and in the 15th of the queen, Saunders, the chief-baron, informed the counsel, that after frequent conferences with his brethren, they were unanimous that judgment should be given for the crown. He said, in the name of the whole court, that they held the entail to remain in Wiatt, notwithstanding the feoffment, as none could have the entail but who were within the intent of the donor. They all held the difference put by Littleton not to be law; for when the tenant in tail grants all his estate, and when he makes a lease for his own life, it is the same thing; for the lessee has it for the life of the tenant, out of whom the entail never passes. And there is no ancient book that warrants the idea of the tail being in abeyance; nor is there any more reason why it should than where he makes a lease for his own life, and afterwards releases all his right; and this seems proved by the words of the writ of *formedon in descendre*, namely, that the right descended from the feoffor (that is, the tenant in tail enfeoffing) by the form of the gift; and if it descended from him, it must be in him at the death. And by *Treboney's* case, 48 Edward III., the reversioner may avow upon the tenant in, notwithstanding his feoffment. And they agreed that 18 Edward III., the 21 Ass., and 40 Ass. before mentioned, proved the reversion in the crown not to be touched by the feoffment. They held the estate-tail extinct in the fee-simple which was in the crown; and to this purpose they approved the case of *Austin*. So they gave judgment for the queen.

But in the 17th year the same question was brought before the Court of Common Pleas in an action of trespass, and they determined it the other way.¹ This encouraged Sir Thomas Walsingham, in 20 Elizabeth, to bring a writ of error in the Exchequer Chamber, where the whole matter was argued again, and much the same topics were urged

¹ N. Bendl., 260, pl. 272.

on both sides and enlarged upon. And in the 21st, the former judgment was affirmed. A flaw had been discovered in the record, which operated in favor of the queen; and when the chancellor was pressed by Plowden to inform them of the ground upon which they affirmed the judgment, the chancellor and the lord treasurer declined it, saying they knew the cause, it was not necessary to declare it. The reporter seemed to have discovered that they all agreed that the flaw was fatal, but that they were not unanimous upon the point of law. So that, after all, upon this question there is only the judgment of the Court of Exchequer against that of the Common Pleas.

To render fines and recoveries, on which so much landed property was now settled, of as great credit and authority as possible, it was provided, by stat. 23 Elizabeth, c. 3, for their due enrolment in the following manner: First, of fines; every writ of covenant, and other writ on which a fine shall be levied, the return thereof, the writ of *didimus potestatem*, made for the acknowledging the fine, with the return thereof, the concord, note, and foot of every fine, the proclamations made thereon, and the king's silver; next, as to recoveries—every original writ of entry, or other writ whereupon any common recovery shall be suffered, the writ of summons *ad warrantizandum*, with the returns thereof, every warrant of attorney, as well of the demandant and tenant as vouchee, then extant or remaining, may, upon request or election of any person, be enrolled in rolls of parchment; and such enrolment is to be of the same force in law, to all intents and purposes, for so much of them as shall be enrolled, as the same, being extant and remaining ought to be.

To make these enrolments of further security, it is also provided that no fines, proclamations upon fines, or common recoveries, shall be reversed for false or *incongrue* Latin, rasure, interlining, misentering of any warrant of attorney, or of any proclamation, misreturning, or not returning of the sheriff, or other want of form in words and not in substance. Persons taking the acknowledgment of a fine or warrant of attorney of a tenant or vouchee for suffering a recovery, shall, with the certificate of the concord and warrant, certify the day and year when the same were acknowledged; nor is the clerk to receive the certificate any otherwise, under pain of £5.

To carry this act into execution, it is also enacted that there shall be an office, called the *Office of Enrolment*, of writs for fines and recoveries, under the care and charge of the puisne judges of the Common Pleas. As to fines, it is further directed that the chirographer shall make out for every county a table, containing the fines passed in every one term, to be hung up all the term next after the engrossing, in some open place in the Common Pleas; and shall deliver to every sheriff, before the assizes, a copy of fines levied for his county, to fix, every day during the assizes, in some open place in court, under penalty to the chirographer and sheriff, whoever omits his part, of £5.

The construction of the late statutes of fines, 4 Henry VII., and 32 Henry VIII., was not settled till after long debate and some difference of opinion among the judges (a). It was much agitated in the beginning of this reign whether, if the five years had commenced, and upon the death of the ancestor the right descended to an infant, the infant should be bound, or should have another five years after he came of age. This was the point in the great cause of *Stowell v. Lord Zouch*,

(a) In a case in this reign, all the parts of a fine were recited and perused, and its nature described and determined by the court; and it was laid down that a fine was a conveyance of record. It was also said that there were five parts of a fine: 1. The original writ, for it was a concord, *finalis concordia*, in a suit, and hence an action must be commenced; 2. A license from the crown to agree, which merely amounted to a fee to the crown, and contained a short note of the parties, the land, etc.; 3. The concord, which began thus: "Et est concordia tales scilicet quod prædict. T. et E. recognoverunt, etc., esse jus," etc. And note, says Lord Coke, that this is the foundation and substance of the fine, for the concord is its ground and substance; 4. The note of the fine; and this was but an abstract out of the concord; but it is to be observed that in the old books the note of the fine is taken for the fine itself (12 *Hen. IV.*, 16; 22 *Hen. VI.*, 51): but it was always understood of the concord; 5. The foot of the fine, which began thus: "Hæc est finalis concordia facta in curia Domini Regis," etc. So that the foot of the fine included the whole, and had the day, year, and place, and before what judge the concord was made. And a fine was said to be engrossed when the chirographer made the indenture of the fine, and delivered them to the party to whom the conveyance was made. And at the common law, immediately after the fine was engrossed, it was sent into the treasury (17 *Edw. III.*, fol. 29). But by the statute of 5 Henry IV., it was enacted that all the parts of the fine should be enrolled with the chief clerk of the bench, who was the *custos brevium*, before the chirographer had them out of court. And before this statute, the *custos brevium* had not any record of the fine, but the chirographer; and nothing remained with the Chief-Justice of the Common Pleas but the license to accord, containing a short note of the fine. But it is provided by the same statute that the original writ should be of record (5 *Coke's Reps.*, 38).

in the 4th year of the queen. The ancestor of Lord Zouch, being disseizor of Stowell, the grandfather of the demandant levied a fine with proclamations. The disseizor died three years after, but within the five years, leaving the demandant his heir within age, who came of full age after the five years expired, and within a year afterwards entered to avoid the fine, and then brought the present writ of entry. It was long argued in the Common Pleas whether the entry was good. The Chief-Justice Dyer and Weston were of opinion it was not; on account of this difference of opinion, they adjourned the matter into the Exchequer Chamber for further argument; and here the judges differed. For it was held by Harper (who had been counsel for Stowell, and upon the death of Brown was made a judge), by Walsh, and by Saunders, chief-baron, that the law was with Stowell; all the others held the contrary, and to them Walsh also came over, having changed his opinion after the argument; so that judgment was given, with the dissent only of Harper and Saunders, that the five years, when once commenced, should run on so as to bar an infant.

To comprehend what was said in support of the two opinions, the act must be considered as divided into four parts; the body, the exception, the first saving, and the second saving; so that they made five points to discuss: 1st, Whether Stowell should be bound by the purview, or whether he should be out of it by reason of the exception. 2dly, If he was, whether he has availed himself of the time prescribed by the purview. 3dly, If he was bound by the body, and not within the exception, whether he should be aided by the first saving. 4thly, If not, whether he shall be aided by the second saving. The fifth point was the equity of the act.

Those who argued for the demandant fought through every branch of the act, maintaining that Stowell was not bound, or if bound, was aided by the exceptions or savings; and the substance of what they said seems to have been this. They first considered the effect and operation of a fine at common law, and before the statutes. They admitted the great power that was ascribed to it by our old law; but yet there was always a tenderness for former rights, and the time of a year and a day was limited within which persons who had a right might put

in their claim ; and it was not till that indulgence had been neglected that a person was barred. But those who were expected to make this claim were persons of full age, who had sufficient discretion to pursue and vindicate their rights. Infants were not precluded even after the year and day had expired ; and this is plainly intimated, first by the statute *de donis*, which says that it shall not be necessary for the reversioner to put in his claim, *although of full age*; secondly, by statute *de modo levandi fines*, which says a *fine* bars all persons being of *full age*. And if infants are not bound to claim within a year, they are bound to no time at all, not to year and day after they come of age. And Brown therefore said if a disseizor levied a fine, and the disseizee, being of full age, died within the year without claim, and the right descended on his heir within age (which was precisely the case here), he was not bound by the time having first attached in his father. For the same reason which exempted him, being an infant, from making claim within the year and day, if he had right at the time of the fine, exempts him, being an infant, now the right descended within the year and day ; for the father who died before the time was elapsed, could not be said to have surceased during the year and day, and the infant was bound to no time, being within the same reason of law as where he had right at time of the fine. The same where there was tenant for life, with reversion to an infant, and the tenant aliened, and a fine was levied, and tenant died within the year, the infant was at large. Thus the law stood before the Statute of Non-Claim, 34 Edward III., after which the law authorized a claim at any time.

The stat. 4 Henry VII., they said, was to remedy the mischief introduced by the Statute of Non-Claim, and to restore the credit of fines, by obliging parties to make their claim as at common law, within a limited time ; but that time was enlarged from one year and a day to five years. They, therefore, considered much of the above reasoning to be still applicable to all entries to defeat fines : and as to the stat. 4 Henry VII., they maintained that Stowell was out of the letter, or at least out of the sense of the letter of every branch of it ; and if he was within the letter of any branch, he was at large by some other branch, and so not bound.

Now, as to the first point, they said that by the body of the act privies and *strangers* were to be bound, *except infants*, etc. And how does the present case stand? Why, Stowell, the grandfather was a stranger to the fine, and so was bound; but Stowell, the heir, was a stranger, but he was within age, and so, by the exception not bound; being excepted, he is the same as if the act had not been made, unless the saving had followed to qualify the exception, and that obliges him to claim within five years. And because it was said, on the other side, that the persons intended by the exception were those who had right at the time of the fine, which Stowell had not, and so is not within it; and in proof of this they alleged the first saving clause, which speaks of persons *HAVING right*, which they said, must mean at the time of the fine. In answer to this, it was said that the act was general, and was meant to bar as well those who had any pretended right, as those who had a real right, for the object was to obtain peace and quiet, and the statute would be as useful a plea in bar to one as the other; and the clause they allege is general, *having right*, that is, at the time of entry, and not at the time of the fine; and it was more material to bar those who had right at the time of the suit (when it was to be tried) than at the time of the fine, for that might afterwards pass away: therefore they said there was nothing in the exception, nor in this alleged cause, nor the following, that showed the persons excepted were such as had right at the time of the fine. Stowell, therefore, was within the exception; and further, if he is not within the exception, he is not within the purview; for it would have been idle to except any but those who would be bound by the purview; so that the argument was retorted upon those who adduced it: and *quâcunque viâ datâ*, Stowell is not bound, and has time to enter within five years after his full age. But admitting him to be comprised within the exception, they said he had complied with that clause which binds persons excepted to make their entry within five years, by entering within five years after he came of full age, and that was the second point.

Admitting the demandant to be bound by the body of the act, and not to be within the exception, then they contended he was aided by the first saving, and this was

the third point in the cause. Now they said the saving was to Stowell the grandfather and his *heirs*, which includes the demandant, but then it is on condition of pursuing his remedy within five years. And here they said the statute must be construed by the usage of the common law, and that did not require infants to pursue their demands, for all actions by infants would be fruitless, as the parole might demur, and the like; therefore, though the right of Stowell is saved under the word *heirs*, yet when the act says so that *they* pursue, etc., it must mean such heirs as are of full age and able to sue. And statutes, they said, had always been construed with such reserve; for stat. Westminster 2, c. 25, which says that a disseizor in assize, who vouches a record and fails, shall be imprisoned, has been construed not to extend to an infant; and again, notwithstanding the general words of stat. Westminster 2, c. 11, auditors cannot commit an infant to the next gaol, and so under stat. Westminster 2, c. 6, an infant who ravishes the king's ward cannot be imprisoned. In these and other statutes, though an infant is within the letter, he has always been construed to be without the meaning, because of his want of discretion.

And, in this case, they said the construction ought to be made, for in preservation of a right, a right favored by the old law, which, as has been already shown, would not suffer infants to be barred by a fine; and as this statute was in support of the common law, it ought to be construed in the same way. And they thought this construction would be well warranted if there had been nothing else in the fact to favor it.

But this construction appears to be pointed out by other parts of the act; for if the act in the exception protects those who had a present right, and were under the disability of infancy, does not the same intent hold place with respect to rights, which are not bound until five years are passed, come to such disabled persons within the five years? There is the same reason to allow it at the end as at the commencement of the five years. And he said by the second saving future rights were protected, *so that they or their heirs take their action next after that they*, etc., which is the same as saying next after that he or his heirs are of full age. So they took this second saving as a construction of the first, and argued that if in a future right the

heir was to have five years after he was of full age, *à fortiori*, Stowell should have it to support a present right.

Further, they said, as to the fourth point, if Stowell was bound by the body of the act, and is not within the exception, nor the first saving, he was yet within the second. For the right came to Stowell *by descent*; it *first descended to him after the fine*, and it descended *by cause or matter had or done before the fine*, for the disseisin was before the fine, by means of which the possession went one way, and the right remained in another, so that every word of the clause is satisfied. And though the right was in the grandfather, yet Stowell was the first to whom it descended, and then it descended in another way than it was in the grandfather, and so may be considered as another person than the heir of the grandfather who was of full age, and therefore he is within the words, so they contended he was within the second saving. But, if Stowell was within the body of the act, and not comprised in the exception, nor the first or second saving, they then resorted to the fifth point, and maintained that he should be aided by the equity of the act.

The justices who argued on the other side were Carey (who had been counsel for the tenant, and was made a judge of the King's Bench upon the death of Corbet), Southcote, Weston, Whiddon, and the two chief-justices, Dyer and Catline; and they began by impressing that great consideration respecting fines, namely, that they were designed for quiet and security of property, and that great mischief had been introduced by the Statute of Non-Claim, which annihilated this principal effect of a fine. By this reasoning they seemed to intimate that the governing idea in the making of stat. 4 Henry VII., and in the construction of it, should be the silencing of claims, and the barring dormant rights. And they were all of opinion that, upon weighing the statute, Stowell seemed to be entitled to no benefit of his nonage, but that he should be concluded by the purview of the act, and was not let at large by any of the other branches.

They said that the purview was as full and as strong as words could be; it declares that it shall be *a final end, and conclude privies as well as strangers*; and it could not be said to be final if others were to set up claims against the conusee, and the intention was not so much to preserve old rights

as to extinguish them. And Catline said all infants were bound which were not within the exception, for if he levied a fine with proclamations, he could not have a writ of error, because he is not within the exception, for those excepted are infants, not parties to the fine; but he being *privy* is bound by the purview, but some of the judges thought this case within the exception. They all contended that the exception included such infants as had right at the time of the fine, and no others; and here the purview being against those who have right, it would be idle to except infants who had none. And as to what had been said, that the purview and exception be construed as well against those who had no right as those who had, they said that right or no right was of no consequence, for the fine might be pleaded equally against both; but the matter was claim of the right or non-claim within the five years, and that would be the issue; and in every action brought a right is claimed, and by such a plea the right would be confessed and avoided; therefore, if no well-founded right, it would be still admitted to be such by the pleadings. Therefore it is not proper to say that the act is made against those who claimed no right. The purview, they said, most certainly extended only to those who claimed a right, or had title or right in possession, reversion, or remainder to the thing comprised in the fine at the time it was levied, or afterwards, upon cause arising before; and the exception of infants means such as had right at the time of the fine, which Stowell is not, for his grandfather then had it, and the purview takes effect against him. And *having right*, etc., in the latter clause, they said, meant at the time of the fine. So they clearly held Stowell not within the exception.

As to the first saving, they said it was general, and accompanied with a condition which ought, in reason, to be taken as generally as the saving. The saving is to *all persons and their heirs*, etc., *so that they*, etc., which word *they* means the person who had right, and his heirs, which means generally every heir, whether within or of full age: again, *so that they*, etc., namely, he and his heirs, whether within age or not, pursue the remedy there offered. And if the condition was construed as confined to heirs of full age, it would be lame, because it would not be as full as the saving; and if they meant it should extend only to the heir of full age, there would have been some provision

that should bind him to pursue his remedy when he came of age, as was done with regard to those who had present right at the time of the fine, or a future right. But they certainly meant that infants should be included. And when it is considered that the great object was to attain peace and security in estates, it was no unusual policy that a rare case, like the non-age of an infant, should not be suffered to impede a design which extended for the benefit of the whole kingdom. For if every infant was to have five years *de novo*, the delay and mischief might be infinite; for Stowell might die before the five years elapsed, and leave an heir within age, and he another, and so on for a century to come, which would lead to innumerable inconveniences and difficulties in all matters of title, and such uncertainty in the trial of them; and this was not consonant to the inclination which had lately been shown by parliament, as appeared by the stat. 32 Henry VIII., for the limitation of suits, and the amendments made therein by stat. 1 Mary, c. 5. So they all concluded that the five years attached in the grandfather ought to be pursued by his infant heir the same as they should have been by himself, for they can admit of no intermission, but must continually pass on. Dyer denied the case quoted by Brown of a fine levied before the Statute of Non-Claim, for he said the infant heir should be bound, inasmuch as his ancestor was of full age.

As he was not aided by the first saving, so they held him not aided by the second, and for these reasons: This clause was to *other* persons, which, they said, must be understood to exclude those comprised in the exception and first saving, that is, to those who had not a present right at the time of the fine, and to their heirs. Now the grandfather is within the first saving, but he had not performed the condition of it, namely, to pursue his right; and Stowell, being his *heir*, is as the same person with him, as to the right, and so he is also within it. So that Stowell being in the first saving, is excluded from the second by the term "*others*." Again, it was said by Dyer, that he was excluded from the second saving by the word "*first*;" which word, he thought, was put into the statute for some great purpose, for stat. 1 Richard III., c. 7, had all the words of the purview and body of this act, except the word "*first*," which was, therefore, not added for nothing; and this word should be joined to each of the words, *accrue*, *remain*, *descend*, or *come*. So that to

take advantage of this clause, the foundation of his title ought to be before the fine, and ought *first* to come after the proclamations; as, for an example, among many others, if a mortgagee is disseized, and a fine is levied by the disseizor, and five years pass, and then the mortgager tenders the money, he shall, by this second saving, have five years after the tender; and so, many cases were put where land might remain, descend, or come after the fine, upon cause arising before. But here, though the right first descended after the fine, yet this was not upon any matter or cause before the fine, for the disseisin was not the matter that caused him to have the right, for he would have had it without the disseisin by descent. But the makers of the act intended some special matter, which should be the efficient cause of Stowell having the right, and such a right as was not in any before it was in him, which is not the case here: the right having been first in the grandfather and descended to him, and was saved to him and his heirs by the first saving; and if it should be said, that it was also saved to the heir by the second saving, because it *descended* to him, then one of the savings would be superfluous. Therefore they all agreed Stowell not within it; and they likewise held he should not be aided by equity.

These were the reasons given by those who argued by Lord Zouch; and they had the effect of inducing Walsh to alter his opinion; so that judgment was given with the assent of all but the Chief-Baron Saunders and Harper, who, it must be remembered, had been previously prepossessed by being counsel for Stowell: and it is said that Corbet, upon whose death Carey had been made a judge, had written an argument on the same side. So that this judgment seems to be settled by very great authority, as well as upon great deliberation. It had taken up the minds of lawyers for some time; we are told each judge took a whole day to deliver his argument, and the cause depended from 4 Elizabeth to 11 Elizabeth, when judgment was given in the Common Pleas.¹

A record of a fine stated one of the proclamations to be made on a Sunday; and as the proclamations in this term could, on that account, be only three, it was readily agreed that such fine had not the binding force given by stat. 4

¹ Plowd., 355-375.

Henry VII. But it was argued, that the fine was wholly void ; for the party having the choice of levying his fine at common law, had chosen to pursue the statute, and not adhering to it, the whole was void. But all the justices held, that the statute did not ordain a new form of a fine ; but a fine remains in substance as it was before the act ; and it binds before the proclamations, and the proclamations are a new entry, and a separate record from the fine ; and error in them is no error in the fine ; accordingly, judgment was given in the King's Bench for reversing the proclamations, and that the fine should stand in force.¹

The object here seems to have been to annul the fine, and to avoid the discontinuance, according to the opinion of Plowden and others ; for the proclamations might have been avoided by plea merely ; and it had been so adjudged two years before, on demurrer in another action relating to the same entail, and the same parties,² as appears both from Plowden and Dyer.

The nature and effect of the proclamations on a fine occasioned new debates on this ancient security. Many doubts arose on this subject. One was, where a remainder-man in tail granted a lease on fine *sur grant et rendre*, and all the proclamations passed after his death, and then the tenant for life of the preceding estate died ; this was the case of *Smith v. Stapleton* ; and it was held, after some argument, that the fine was not avoided by the descent of the remainder, notwithstanding the proclamations passed after the remainder-man's death.³

A fine with proclamations, by force of stat. 4 Henry VII., and 32 Henry VIII., was construed to be a complete bar to the issue, whatever became of the estate conveyed by the fine, or whatever claim might be made by the heir ; for after the proclamations passed, the heir was estopped to claim anything. This appears from several determinations in this reign, but particularly from the famous cases of *Lord Zouch*, and those of *Archer* and of *Purslowe*. In *Archer's* case, in 20 Elizabeth, the grandfather and his wife were seized in special tail. The grandfather died, and the father disseized the grandmother, and levied a fine with proclamations ; the grandmother died, the father died, and it was held, that the son was barred, notwith-

¹ 4 and 5 Eliz. *Fish v. Broket*, Plowd., 265.

² Plowd., 430.

³ *Ibid.*, 266. *Dyer*, 182, 55.

standing the father at the time of the fine levied had only a possibility to the estate-tail, during the life of the grandmother, for the judges expounded stat. 32 Henry VIII., "entailed to the person levying, or to any of his ancestors," so as that the fine should bar the right descending afterwards; both as to himself and those who were heirs in tail to him.¹ Again, in *Purslowe's* case, in 24 Elizabeth, where the proclamations passed pending a writ of formedon, it was held by the whole court, that the fine with proclamations might be pleaded in bar; notwithstanding a right of entail descended, and the right was pursued immediately by bringing the writ of formedon; for the fine was the conveyance, and the proclamations are but a short repetition of the fine, and to show that the fine is levied according to stat. 4 Henry VII.²

In the case of *Lord Zouch*, in 28 Elizabeth, it was resolved by the whole Court of Common Pleas, that the heir in tail was estopped to allege the seisin and continuance thereof in a stranger, at the time of the fine levied, or to aver *quodd partes finis nihil habuerunt*; and upon consideration it was further held, that even before stat. 4 Henry VII., and 32 Henry VIII., by the better opinion of the books, the issue in tail were not admitted to such averments; and this they thought appeared by stat. 27 Edward I., c. 1, *de finibus levatis*.³

After these adjudications, some of these topics were reconsidered in the great case of *finis* in 44 Elizabeth. This was upon solemn advice and argument before all the judges. The case which gave occasion to this review of former determination was this: *A.* tenant for life with remainder to *B.* in tail, the reversion to *B.* and his heirs. *B.* has issue, and levies a fine, and dies before all the proclamations are passed, the issue then being beyond sea; the proclamations are made, and afterwards the issue in tail returns, and makes claim on the land to the remainder in tail; and the judges, in considering this case, came to four resolutions. First, they agreed that the estate which passed by the fine, as to the estate-tail, was not determined by the death of *B.* Secondly, that although a right of estate-tail descended to the issue, because the tenant died before all the proclamations passed, yet when they did pass, without claim made

¹ 3 Rep., 90.

² Ibid.

³ Ibid., 88.

on the land, the right is barred by stat. 4 Henry VII., and 32 Henry VIII. And, thirdly, which was the principal point, it was agreed by all the judges but three, that in the present case, the issue being heir and privy, could not by any claim he could make save the right of the estate-tail, which descended to him, but after the proclamations made, the estate was barred by the said statutes; and for support of this resolution they founded themselves chiefly on the above cases of *Lord Zouch*, *Archer*, and *Purslove*. And their fourth resolution was, that the issue being privy, and out of all the savings of stat. 4 Henry VII., is bound, although he was beyond sea, in the same manner as if he was within age, under coverture, *non compos*, or in prison; and in this opinion they all agreed.¹

The decisions in all the foregoing cases were calculated to give efficacy to a fine when levied, and to prevent it being invalidated by dormant claims, and the title conveyed it, being subjected to perpetual hazards. But this was only to secure those to whom a fine was acknowledged by persons having a good and lawful estate: and not to protect collusive practices, where the conusor had not such estate as he might lawfully pass by fine. The following was an instance, where a fine was made use of in order to trick a lessor out of his inheritance: a tenant for years, and at will, and also by copy, demised all these several lands for life, and then levied a fine of these together with other lands of which he was seized in fee in the same town; and after five years had passed he claimed the inheritance, as if the lessor was barred by the fine and new claim. These were the circumstances in *Fermor's* case, in 44 Elizabeth. This being a point of great importance, highly concerning the common conveyance and assurance of estates, the lord keeper referred the consideration of it to the Chief-Justices Popham and Anderson, who thought it advisable to take the opinion of all the judges upon it; and after two days' debate at Serjeants' Inn, it was held by all of them, except two, that the fine was no bar; and for this opinion they gave four reasons: First, they said, because stat. 4 Henry VII. says that fines are for avoiding of strife; and covinous transactions like this by lessees, to the prejudice of their lessors, would be the cause of

¹ 3 Rep., 84.

endless strife and debate. Secondly, because it never could be intended by the makers of the act, that those who could not levy a fine should, by making a tortious estate, be thereby enabled to do it. Thirdly, because all acts, as well judicial as others, and which of themselves are just and lawful; yet, when mixed with fraud and deceit, are, in judgment of law, wrongful and illegal, and therefore, a fine levied by covin shall not bind. Fourthly, because, by the demise for life, the lessee had so contrived it as to prevent the lessor of his remedy by entry or action, as he did not know of the demise, which did the wrong; and again, the lessee having lands of fee-simple in the same town, the presumption must be, that the fine related to them; and the lessee still continued in possession and payment of the rent.¹

The notion that levying a fine was such an act as amounted to an extinguishment of a proviso in a deed, gave occasion to the great debated point in *Lord Cromwell's* case, the circumstances of which were these: A., seized in fee of a manor, with an advowson appendant, conveyed it by bargain and sale to Andrews in fee. By the same deed, A. covenanted that the manor should be recovered against him to the use of Andrews in fee, rendering £42 rent in fee; and it was further covenanted, that a fine should be levied of the manor to Andrews, and that Andrews should render back the rent in fee, with proviso that Andrews should by deed give the advowson to A. during his life; and if it was not void in his life, then one turn to his executors. And it was further covenanted, that all other assurances to be made should be to the above uses. A recovery was suffered; and afterwards A. and Andrews levied a fine to one Perkins in fee, who rendered a rent of £42 to A. in tail, with remainder over to another in fee, and rendered the manor to Andrews in fee. All this was found in a special verdict; and further, that the fine was not levied on a new consideration, but to the uses of the deed. Further, Andrews did not grant the advowson in his life according to the deed, nor did A. request him; but after Andrews' death, and the advowson became void, A. entered for the condition broken. And it was resolved by all the judges in the Exchequer Cham-

¹ 3 Rep., 77.

ber, first, that this proviso was a condition ; secondly, that by the recovery Andrews had the land, and A. the rent by force of stat. 27 Henry VIII., and that the fine levied by A. and Andrews to Perkins did not extinguish the condition ; for it was declared in the deed, that all assurances should be to the uses in the deed, among which the fine levied to Perkins is one ; and the use and intent of the deed was, that the proviso should remain, and that the estate of Andrews should be subject to it ; and, therefore, the fine was so directed by the general covenant as to have a special operation, according to the intent of the parties ; namely, that the condition should be saved, but the right and title to the manor extinguished.¹ And this construction was to take place, because fines and recoveries are common assurances, and always to be governed by the agreement and covenants of the parties ; and therefore, as well as in some other cases, the saving need not be in the same record or fine, which entirely answered the objection, that land being conveyed by the fine, the saving which was in the covenant could not preserve the condition ; and this was supported by the authority of many cases. Another reason was, because the bargain and sale, the recovery and the fine, though made, suffered, and levied at different times, constituted the same conveyance, agreement, and assurance.

The next objection was, that the fine being on grant and rendre, imports a consideration in itself, and therefore cannot be averred by parole to be to a use, though it might by deed ; and the finding of the jury was not material. And as Perkins had the land by fine, his estate ought not to be affected by a deed made between A. and Andrews, to which he was not a party. And to enforce this objection, many reasons were urged, as that the general covenant should not direct the use of a fine levied upon a new consideration and agreement, which this fine does ; because he rendered the land to one and a rent to the other ; because he was a stranger ; because the rent is in tail, and by the covenant it was to be in fee. But to all this it was answered and resolved, that where there was such a difference between a fine *per grant and rendre* and an agreement, it might be set right by parole ; that Per-

¹ 2 Rep., 73.

kins had no power to limit a use, but was a mere instrument; that although the estate of the rent was altered, the jury had found there was no new agreement, but that the fine was to the use of the deed. So that the fine was clearly held not to extinguish the condition, but to be to the use of the deed: and then, fourth, they all resolved, that by the death of Andrews the proviso or condition was broken, and therefore the entry lawful.¹

A fine might be so levied by tenant for life as to be no forfeiture of his estate; as in *Breedon's* case, where tenant for life with several remainders over in tail, and the tenant for life and the first remainder-man join in levying a fine to one in fee, who renders back a rent-charge to the tenant for life. The first remainder-man died without issue; the second remainder-man entered, and the tenant for life distrained and avowed for the rent: and it was resolved by all the Court of Common Pleas, that the fine was no discontinuance either of the first or second remainder, because each of the parties to the fine gave that which he had a right to give; that is, the tenant for life gave his estate, and he in remainder a fee-simple determinable on his estate-tail: and as the tenant for life gave what he had a right to give, the law will not construe it a forfeiture. The rent, therefore, was held to remain after the death of the first remainder-man in tail.²

That branch of the stat. 27 Henry VIII. which related to jointures began also now to be better understood. We have seen that in many cases where a jointure was not made according to some or other of the descriptions in the act, it had been attempted to recover dower, as if it was not barred; but the justices had laid it down for a rule, that any joint-estate of freehold (except a fee-simple) to be held after the coverture was sufficient to satisfy the statute.³ The court went now still further: a father, upon the intended marriage of his son, made a feoffment to the use of the intended wife (naming her) for life. This was *Ashton's* case, in 6 Elizabeth. It was thought that this settlement, being made not by the husband, nor of his land, and before marriage, was not a bar, and therefore the widow brought a writ of dower;

¹ 2 Rep., 73.

² 40 Eliz. 1 Rep., 76.

³ *Vide ante.*

but the above objections were overruled.¹ But, on a subsequent occasion, where Sir Morris Dennis had covenanted to stand seized to the use of himself and his heirs till marriage, and after marriage to the use of himself and the said Elizabeth (to whom he was to be married), and on a writ of dower, it became a question whether this (with an averment that it was for a jointure) should be a bar, the justices were divided; for Catline, Saunders, and Dyer thought that it was an estate within the equity of the statute, and the third proviso, which speaks of a jointure *pro termino vite*, or otherwise; and Brown and Whiddon were of a different opinion.²

Thus stood the law on this subject when *Fermor's* case came before the Court of Common Pleas in 14 Elizabeth. The decision in this cause has since been looked up to as a leading authority, which is more to be attributed to the full manner in which it is treated by the reporter, than that any great accession was thereby acquired to the construction of the statute. A feoffment had there been made to the use of the feoffor for life, with remainder to his wife for life, and remainder over: upon a writ of dower, this matter was pleaded in bar; to which the widow replied, that the above estate made to her on condition she should perform his will, and she prayed the judgment of the court whether the tenant should be received to aver that the estate was made for a jointure; and, upon demurrer, it was resolved, first, that a limitation in remainder to the wife was within the intent of the statute, and that it was not less so for being on condition; for it is still an estate for life, as required by the statute, and the condition to perform her husband's will, though a consideration, yet it might very well be averred to be for a jointure, as one consideration would stand with the other; and all this was adjudged by Dyer, Monson, and Manwood against Harper, as appears from Dyer, 317, 7; for Lord Coke speaks as if the court was unanimous. These were the principal points decided in this case, being such upon which the cause rested; but the subject of jointures was very fully considered, and some other points were resolved, as preparatory to found or illustrate the principal points, in the course of which the

¹ 6 Eliz. Dyer, 228, 46.

² 8 Eliz. Dyer, 248, 78.

foregoing cases were reconsidered, and the judgments there given were accounted for upon principle.

They said, that the five estates mentioned in the act are only put for examples, and not to exclude any others which are within the meaning of the makers of the act, and an estate in remainder to the wife was as beneficial as one to her husband and her for life. All that was required was that the estate should be limited in its creation to take effect immediately after the husband's death; which seems plainly pointed out by the examples given in the act; and no estate should be taken by the equity of the act, which did not give the same benefit to the wife as all those do. And it was upon this principle, they said, the cases of the *Duchess of Somerset* and *Ashton* before mentioned were determined. And upon the same principle they held, that a feoffment to the use of the feoffor for life, remainder to the use of *B.* for life, and afterwards to the use of the feoffor's wife for life, for a jointure, it would not be within the statute, even though *B.* died before the feoffor. And they defined a jointure to be a competent livelihood of freehold for the wife, to take effect immediately after the death of the husband, for the life of the wife, if she is not the cause of the determination or forfeiture of it.

It was said by Lord Dyer, that the averment of the estate being for a jointure, though against the express condition, was justified by the case of *Bitters and Beaumont*, 4 and 5 Philip and Mary, Dyer, 146, which was not so strong a case as the present; for the averment is given by stat. 27 Henry VIII., by the words, "*for the jointure of the wife.*" And he denied the case in *Brook*, *vide ante*, where it is said to have been held, that a fee-simple was no jointure, which might perhaps be true under stat. 11 Henry VII., but is certainly a good jointure according to the above definition, and clearly within the equity of the act, and the words also; for the act says, an estate for life, *or otherwise*, which surely takes in a fee-simple.

One of the points which branched out of this case, and which the court resolved, was, that a widow cannot waive a jointure granted *before* marriage; and they thought it was plainly implied by the proviso in the act, which allowed a wife to refuse a jointure made *after* marriage. And it was said that land given *in part* of a jointure, or part of

2
Will

dower, shall not be construed a bar, but shall be held together with the dower.

After Lord Dyer had concurred in the judgment given in *Vernon's* case, and has so recorded it in his own report, we are astonished to find, two years after, that he declared himself of a different opinion; for he says of himself, that he thought an estate for life to a wife, after the death of a husband, could not be termed or construed a jointure, for two causes; first, she ought to take an estate jointly with her husband, according to the etymology of the word; secondly, stat. Richard II., c. 6; stat. 11 Henry VII., c. 20; stat. 27 Henry VIII., c. 10, make no mention of such estates, but invariably speak of a joint estate. But this opinion is accompanied with a query,¹ and the doctrine of *Vernon's* case seems to have continued in full force.

The opinion of the justices in the time of Edward VI., that a devise by will is no bar of dower, but a benevolence, and not a jointure, deserves some consideration. It was adjudged in 38 Elizabeth, in *Leah v. Randall*, in the Court of Wards,² that in a devise for life to a wife, generally, it cannot be averred to be for a jointure. First, because a devise implies a consideration in itself, and therefore cannot be averred to be for any other use than is expressed in the will, and shall be taken as a benevolence, according to the case above mentioned. Secondly, by the stat. 32 and 34 Henry VIII., the whole will ought to be in writing; therefore no averment can be received against the express written words. But they resolved, that a devise may be made for a jointure; for as an estate made before the marriage had been held, by former decisions, to be good within the equity of the act, so shall a devise which is to take effect after the dissolution of the marriage by death. And this is one of the cases where an act under the authority of a latter statute shall be taken within the equity of a former; for a devise was not lawful till stat. 32 Henry VIII., which was five years after the Statute of Uses and Jointures.³

A devise attended with the following circumstances, occasioned a judicial decision upon three very material points. A man devised land to *B.*

Devises by will.

Devises of land.

¹ 17 Eliz. Dyer, 340, 50.

² 4 Rep., 4.

³ *Vernon's Case*, 4 Rep., 1.

and his heirs; after that he purchased other lands, and then *B.* died; then the devisor said to the heir of *B.* that he should be *his* heir, and should have all the lands which *B.* was to have had by the will, if he had survived. And it was debated, 1st, Whether the newly-purchased lands did not pass by the will; 2dly, Whether by the death of *B.* in the lifetime of the devisor the heir took nothing; and, 3dly, Whether the verbal declaration of the devisor was not sufficient to give him the land. All the justices concurred in the negative of these propositions, except that Walsh differed from them in the principal one, which was the second. This was the case of *Brett v. Rigden*, in 10 Elizabeth, and as it was a determination of some importance (particularly the second point), the arguments on both sides are worth remembrance.

It was argued in support of the first, that a will is of no force or effect till the death of the testator, and, therefore, it ought to be construed as if spoken at the last instant of the testator's life; and then the gift of *all* his lands must, to have its proper construction, be taken to mean *all* he had at the time of his death. It was upon this idea, they said, that if a tenancy escheats after a devise of a manor, and before the devisor's death, it passes by the will. Again, if a will of land was made by a feme-sole, who afterwards married, but survived her husband, and then died, this will would be good, because it was so at her death; and if it was considered from the date it ought to be countermanded by the intermarriage. The words were so general, that it was plain that the testator meant there should be no exception; and they said, if a man devised all his plate, and then bought more, and so died, the devisee should have all he died worth on account of the largeness of the words.

On the other side, the justices said, the intent was the principle that was always to govern in the construction of wills; and here, when he made his will, his intent was, the devisee should have the land of which he was then seized, and it could not be his intent to give what he had not; neither had he purchased the new land when he made the publication; and when the will was consummated by his death, that consummation must be consonant to and in pursuance of the commencement, for to make the consummation differ from the intent at the commencement, they

said, would be incongruous, and not like an act of discretion, therefore the intent at the time of making and of publication should govern; and that the commencement of wills was to govern was proved by this, that if a feme-covert devised land by custom, and then her husband died, and then she died, the devise would be void. So of an infant who dies of full age. So if there was a grant of all lands held by *T. S.*, and afterwards the grantor purchases new lands held by *T. S.*, they would not pass; but they admitted, in the present case, if there had been a new publication of the will after the purchase, it would have been sufficient. To all which it was added by the Lord Dyer, that by stat. 34 and 35 Henry VIII., the devisor must be *seized at the time of the will*.

In support of the second point, it was urged that the testator, by devising to *B.* and his heirs, certainly meant the heir should take. And though he might mean that he should take mediately by descent, and not immediately, yet the effect being that he should have some estate, and the mode of estate being only the form, it would be strange to say, because he cannot take it in the precise form, that therefore the substance and effect of the will should be disappointed by adjudging that he should take nothing. As in a devise to the wife of *T. S.*, if *T. S.* dies, and she marries some one else, yet she shall take, because the effect was, that she should have an estate, and it was incidental whether she was at the time the wife of *T. S.*, or of any other. Again, a devise to *A. B.*, dean of St. Paul's, and the chapter and their successors, though *A. B.* dies, yet the land shall vest in the new dean and chapter. For the intent was that the chapter and their successors should be benefited, and *A. B.* was no particular cause of the gift; so here the intent was, that the heirs of *B.* should have the land forever, and he himself was only one of the causes of the gift. It was a rule that conditions should be performed according to their intent, and that would be sufficient in law, though the words were not exactly pursued, and *à fortiori* should it be in wills. Thus, in 21 Richard II. land was devised for life, remainder to the church of St. Andrew, and when it was said that the church was not *persona capax*, yet the devise was adjudged good to the parson, who, though not named, was comprehended in it.

But all the justices, except Walsh, argued that it was a

principle in law, that in all gifts, whether by devise or otherwise, there must be a donee *in esse* capable to take the thing, when it ought to vest; and here, as the thing was not to vest till the death of the testator, *B.* was not then *in esse*. They said, the heirs were not named to take immediately, but only to express the quantity of estate which *B.* should have, for he could not properly be made tenant in fee, without naming his heirs. It was, therefore, in favor of *B.* that the heirs were mentioned, in order to give *B.* that ample and complete estate which he might dispose of as he pleased. They said, that to argue that the heir should take it, notwithstanding *B.* died in the life of the testator, naturally led to this, that if *B.* had died without heir, the lord should have it by escheat, and that the wife of *B.* should be endowed; which, and some other conclusions, are too absurd to be sought for, although they follow from the same reasoning. And in cases of chattels, it might with the same reason be said, where a lease or goods are devised, and the devisee dies in the life of the testator, that they should vest in the executor of the devisee. Therefore, they said, such things as would follow by conclusion if the estate had vested, are not good causes to make an estate vest in others than the precise person to whom they were limited. These were the reasons upon which the justices determined this point; but Walsh neither adopted the reasons nor concurred in the judgment, and as his reasons are not given, we must suppose he concurred in some or all of those which we before gave as the argument of counsel on that side.

The justices were unanimous upon the third point, as they first were upon the first. This opinion thus rested upon the stat. 32 and 34 Henry VIII., which requires every will of land to be in writing; and, therefore, the verbal declaration made to the heir could not amount to any devise.¹

These were the resolutions, and this the state of opinions on this subject, when *Corbel's* case came before the Court of Common Pleas in 42 Elizabeth; and there it was resolved by the whole court, that a proviso to cease an estate-tail, as if the tenant in tail were dead, was repugnant, impossible, and against law, for the death of tenant in tail was

¹ Plowd., 341.

no *cesser*, but only his death without issue. Therefore, the present is like a limitation for an estate-tail to cease, as if the tenant in tail had granted a rent-charge, or made a lease, or done any other thing, which was, in truth, no *cesser* of the estate. The judges gave their opinions severally upon this case; the Lord Anderson relied upon the case of *Germain v. Arscot*, which being in case of a will was stronger than the present, as such instruments always receive a favorable construction; the other was *Cholmley v. Humble*, which was a use, like the present; and it was clearly held in that case, and so laid down in the present, that no limitation could be made of a use, since stat. 27 Henry VIII., which could not be made of a state in possession. Walmesley agreed that an estate, or part of it, could not be determined as to one, and continued as to another; but he said it might be defeated wholly by condition or limitation; and in this case, as the donor wanted the estate-tail to cease as to one, and be continued as to another, during the life of the tenant in tail, it was therefore repugnant, and equally void with a feoffment in fee to the use of *A.* and his heirs every Monday, to the use of *B.* and his heirs every Tuesday, and so on, these being fractions of estates which the law will not allow. And though an act of parliament, or the common law, might make an estate cease as to one person and continue as to another, yet no person should do it by his deed; and he gave some instances of such estates at common law. Glanville said, no such proviso as the present had been seen between the time of the stat. *de donis* and of uses, and therefore it should be concluded that such estates were not allowable by law, though he quoted the settlements made by Justice Richil and Chief-Justice Thirning, mentioned by Littleton, and held, at that time, not to be legal limitations.¹

It is remarkable, that in this case no notice whatever is taken of the decision in *Plowden*; and it is still more remarkable, that in the following year a similar proviso being brought in question in the case of *Mildway v. Mildway* in the same court, it was held by Walmesley and Warburton (who had succeeded Glanville) to be good, against Anderson and Kingsmill, who adhered to their former opinion. Warburton maintained that the proviso was

¹ 1 Rep., 84.

not repugnant, and argued, that the possession given to the use by stat. 27 Henry VIII. should cease without claim or entry, as the use itself might before the statute; so that by *the going about*, etc. (which was an issuable matter), the estate ceased. And as to the supposed repugnancy of the words, *as if he were naturally dead, and not otherwise*, he said, these were only of abundance and surplusage; and the sentence must be construed, as it lawfully might, namely, that the estate-tail should cease during his life, and should afterwards arise in his issue, which was neither repugnant nor inconvenient. In answer to *Corbet's* case, he said it was only a feigned case, and ought not to bind the conscience of any judge. As to *Germain v. Arscot*, he said, that was of a possession, and not of a use, as this is; and that *Cholmley v. Humble* differed from this, but he did not show how it differed. Walmesley agreed with him, that the use might cease without entry or claim; and further, that the condition was not repugnant, and confessed that he had given a doubtful opinion in *Corbet's* case; but now, upon better advice and deliberation, he was of opinion that it was not repugnant, but that the estate-tail might well cease during all the life of the tenant, and again revive in his issue. Anderson and Kingsmill insisted wholly on the reasons in *Corbet's* case, and that uses were not to be compared to devises, and that uses could not cease in possession without claim or entry.¹ What afterwards became of this case does not appear.

Such were the changes and such the fate of this *vexata questio*, which was agitated and determined, in both the King's Bench and Common Pleas, sometimes one way and sometimes another. The idea upon which these limitations were made and taken up by the courts was that of *perpetuities*, the whole consideration of which was a struggle between the rules of law and public expediency. Those who were for supporting such provisos, and *perpetuating* the limitation of estates in the way they had been originally disposed, founded on the distinction between gifts to a use and by will, and gifts in possession by deed. It was, seemingly, admitted on all hands, that gifts at common law could not be limited under conditions like this; and when it is considered that uses, since the statute,

¹ Moore, 632.

were mere estates in possession, it only remained to avail one's self of the great indulgence the law allowed to wills in order to effectuate the testator's intention in the manner he had expressed it: and if we weigh every inference that may be drawn from the foregoing decisions, we shall perhaps find, after all, that such provisos in wills, at least, were not thought illegal, for none of the above cases, except *Germain v. Arscot*, were upon a will, and there, it is true, the judgment was against the proviso: yet, there are these authorities the other way; there is the unanimous decision in *Scholastica's* case, in Plowden: there is *Sharrington v. Minors* upon the identically same proviso, determined many years afterwards by a different set of judges, though with the dissent of Popham; so that both the King's Bench and Common Pleas decided this question; and the decision in *Scholastica's* case is not observed upon or denied in any of the subsequent decisions that went the other way, so that it is probable many assented to the declaration of Dyer in that determination, that a man's will was as an act of parliament for the ordering of his property. This may be urged to show, that whatever opinion might be entertained about such a proviso in other cases, it was not thought so evidently illegal in a will; and when to this is added the declaration of Walmesley in the last case, and the equal division of the judges, notwithstanding former decisions, we are quite at a loss to say what was the governing opinion at the close of this reign upon these provisos, whether in a deed or a will. This point, therefore, was left for further discussion in after-times.

A remainder of a term for years was another point in the law of devises that had created much discussion: two cases of this sort happened nearly together in the 20th year of the queen, in which this matter, after some consideration, became to be better understood. These were *Welsden v. Elkington*, in the Common Pleas; and *Paramour v. Yardley*, in the King's Bench.

In the former of these, the testator, having a term of sixty years, willed that his wife should have and occupy the land for so many of the years as she should live; and after her decease, he bequeathed the residue of the years of the lease unexpired to his younger son; and he made his wife executrix. After his death the widow entered; and then the son dying, and the widow, after having sold

the term, dying also, the administrator of the son claimed the remainder of the term.

Upon the argument of this question, it was strongly endeavored to prove the devise over to be unsupported by law; but it was held by all the court, that the remainder was good. For they said, that by circumlocution the lease was here given to the widow for her life; that is, should have the whole of the lease if she lived so long: and if she died during the lease, that the son should have it during the residue of the years. And it was the business of the court so to marshal the words as the construction may give effect to the intent. Then, suppose the son's estate had been expressed first, and then the wife's; as if it had been to the son from the death of the wife unto the end of the term, and then he had further devised the land to his wife for life: this form of words would have served both the wife and son, and would have been warranted by law. Now, they said, the present devise was this in substance and words; and the court must adjudge which part of the sentence comes first. As if a devise was made in fee to *B.*, and afterwards in the latter part of the will, a rent-charge was given out of the land to *D.*, here, though the rent came last, and might seem repugnant, yet it was good; and it was the office of the court to marshal the words and make the two sentences stand together. And it was said, there was a similar case to the present in the king's bench, meaning that of *Paramour v. Yardley*, which they stated, and the reader will see more at length presently. And this indulgent construction of the words, they said, was dictated by the principle in which all wills were expounded: to prove which, they cited many adjudged cases, which were then leading authorities, and some of which have been mentioned before.

In answer to the objection, that the estate limited to the son was uncertain, because the wife might outlive the term, and therefore the devise should be void for this uncertainty, they said, this was a certainty upon an uncertainty, which was no common thing in contracts, as a lease habendum from the death of *T. S.* to such a time would, it is true, be void, if *T. S.* lived beyond that time, but otherwise would be good. Again, a devise of so many years of a term as *T. S.* shall name, is good; if *T. S.* names any otherwise, is void. And here, by the death

of the widow, the estate limited to the son was made good; though it was at first uncertain whether he would have any at all. Again, in answer to another objection, which was, that the wife had only the occupation and no part of the term, and therefore her occupation was no execution of the *term* to the son, that being a distinct thing (a point much labored on the other side), Lord Dyer said it was not so; for the interest to the son and to the wife was of one and the same thing: namely, the land for a devise to occupy is a gift of the land, and she had *jus possessionis*. And, therefore, the execution of the legacy in the wife was an execution to the son also, it being one and the same term, and the wife might be said to have the whole term, but *sub modo*. Her claim as legatee ought to be adjudged a good execution of the term, as well to the son as to her, for no other assent could be had to the estate of the son in the life of the wife. They said the limitation to the son was not a possibility, as Popham called it, but a devise of the land itself.¹ Therefore they all agreed that the administratrix of the son should have the land.

The case of *Paramour v. Yardley*, which was determined just at the same crisis in the King's Bench, was as follows: A lessee for years devises his term to his son (with certain limitations that make no part of the question then litigated), with remainder over; and then adds, that his will was, that his wife should have the occupation and profits of his lease until his son came to the age of twenty-one years. She sells the term, and the son at his full age enters. In this case, it was objected that the lease being given to the son, the latter devise to the wife should be void for the repugnancy; and then her entry by force of the devise was only as executrix, in which case her occupation as executrix could be no execution of the legacy to the son; from which they inferred that the grant of the term by the widow would bind the son.

But it was argued here, as in the former case, that the law should marshal these clauses so as to give them coherence and effect, and the same cases and the same reasoning was gone over as before; to all which the court assented. Again, when it was urged that the devise of

¹ 20 Eliz. Plowd., 522.

the occupations and profits was not a devise of the land, the like was given, though somewhat more fully, as in the former case. When these two points were determined, 1st, that it was a good devise to the wife; 2dly, that it was a devise of the land, there remained the third and principal part of the objection to the plaintiff's claim, namely, that the wife being executrix and legatee when she entered, it must be taken of course that she entered as executrix; and if she would have it as legatee, she ought to do some act that would prove she accepted it as a legacy; and if she does not that, but on the contrary does some act as executrix, such act will manifest her intent, and be a disagreement to the legacy from the beginning; and they said her grant of the whole term was such an act, for she could not assume such right but as executrix. They thought another good reason why she should be said to have any part of the term as legatee was, because it was found by the jury that £100, owing by the testator, was unpaid; and also by the will, that several sums were devised; and as it must be intended they were not paid, she might alien the whole term to pay them; and this, they said, was another cause to delay the execution of the legacy. A third reason was, that she was by the will entrusted with the education of the children, and the occupation and profits were devised to her for that purpose; and the education of the children is rather a legacy to them than to her: and the principal intent of the testator in his devise to his wife was to see his will performed, which purpose is not sufficient to make it a legacy to the wife; for a gift of goods to an executor, to see his will performed, is no devise, it being what the law of itself would give.

In answer to this, it was argued and agreed by the whole court, that the term given to the wife ought to be adjudged executed in her, and the remainder in the son: for if it had been devised to a stranger, he might have sued the executor in the spiritual court; but when made to the executor, as he cannot sue himself, it shall be adjudged in him by operation of law like a remitter. And as it was better for the wife to have it to her own use during the minority than to the use of the testator, the law will construe it to be in her as a legacy. Again, by her accepting the duty of the testament, she has assumed

to pay legacies; and as the devise to her was a legacy, she has, in law, accepted the term as a legacy, merely by accepting the executorship; for the law, before anything done one way or other, gave judgment that she had the term as a legacy, and not to the use of the testator: though it was admitted that she might signify her disagreement, but till then it was to be construed as a legacy. Now, in this case, as she had educated the children, and so performed the charge annexed to the legacy, this showed her assent to take it as a legacy; and the grant afterwards was an argument of her inconstancy, and did not invalidate the election she had before made.

As to the debts, they said, that was answered by the special verdict, which had found that she had sufficient assets besides the lease; and this legacy ought to be paid as well as the debts. Suppose the legatee was a third person, the executor, who had assets besides, could not sell the lease; no more could the executrix in this case. And this being the devise of a specific thing, must be performed according to the devise; though it would be otherwise if a sum of money was left, for then she might sell what property she pleased, so as the sum was paid; and they said, if the wife in this case had disagreed to the devise, that would not have defeated the devise to the son, for he would have had the devise presently. And the same reasoning and answer might more forcibly be given to the objection that the other legacies were not paid: so that the execution of the term, which was also a legacy and a specific one, should not be delayed on account of their non-payment: though in the present case it did not appear by the verdict but that they really were.

To the other objection, that the devise, being to the executor to perform his will, was no more than the executor should have done without the devise, and so it was void, they said there was another cause of the devise, namely, the education of the children, which is not a thing testamentary, nor a legacy to the issue, but it is an intent annexed to the devise made to the wife; and as only a part of the lease was given, it is a different disposition from that the law would have made: for as a devise in fee-simple to the heir is void, so a devise in tail, or any less estate, is good, because it differs from that which the law would give him. So that none of the objections were

sufficient causes to prevent the execution of the legacy to the wife.

Further, they considered the devise to the wife and son as one legacy, though the estates were several; and, therefore, the execution of the wife's legacy was an execution of the remainder to the son. As a reversion granted for life-remainder in fee, if the particular tenant attorns to the tenant for life, this ensures to him in remainder; for if the first devise had been to a stranger, with remainder to the son, and she had assented to the first devise, this would enure to the son; and the present case is the same in effect. Therefore, they held the son's entry after the death of the wife to be lawful.¹

A practice had obtained for persons who were entitled to have the administration of intestate's goods, Executors and administrators. to procure it to be granted to some stranger of mean circumstances, from whom they would take deeds of gifts and letters of attorney, by means of which they obtained possession of the effects, and yet were not subject to pay debts; and the administrator in the meantime could not be found, or, if he could, was not of ability to satisfy out of his own goods the devastation he had committed of the intestate's by the above proceeding. It was therefore endeavored to remedy this by stat. 43 Elizabeth, c. 8, which enacts, that every person who shall receive any goods or debts of an intestate, or a release or other discharge of a debt or duty upon any fraudulent intent like that above mentioned, without such valuable consideration as shall nearly amount to the value thereof, shall be charged as executor of his own wrong as far as such goods, debts, or release will satisfy, deducting for himself an allowance of all just debts owing to him, upon consideration without fraud, and all payments which lawful administrators or executors ought to make.

In the case of *Graysbrook v. Fox*, the nature of administration and the authority of executors were much discussed. There a person had made a will and appointed executors, and died: the ordinary, before probate, commits administration to *T. S.*, who sells certain goods; afterwards the executor proves the will, and brings detinue against the vendee. And it was held by Walsh, and Dyer,

¹ Plowd., 539.

chief-justice, in favor of the plaintiff, and Brown afterwards signified his concurrence; but Weston was of opinion for the defendant.

Weston seems to argue from the great sway the ordinary had at common law in these matters, the goods of an intestate being to be disposed *in pios usus*, as he should direct, without being liable to the demands of the intestate's creditors (a). And so it continued, till by stat. Westminster 2, c. 19, he was made liable to such suits as executors before were liable to. But, because the ordinary had no power to bring actions, it was further enacted by stat. 31 Edward III., c. 11, that he should appoint the most lawful friend of the deceased to administer, and to bring and defend suits as an executor: and he said the ordinary might, before this act, have committed administration, as a part of his authority to dispose; and such committees might be sued by equity of stat. Westminster 2; so that the power to recover seems the only purview of the act. The administrator's power over the goods is a very ancient common-law authority, so as to sell and dispose as he pleased. And, in this case, he thought the sale good; because, in the pleading, it is declared that the ordinary had notice of the testament. And if the executor secretes, or keeps back the testament, the commission of the ordinary is regular, and of necessity, that the goods may be taken care of; and he is not bound to inquire after the testament. The executor is not to avail himself of his own silence by avoiding the sale made by the administrator. He said, that where executors refuse, or afterwards die intestate, these were cases not within the act, and yet it was usual to grant administration; because the intent of the act was, that where no executors were to intermeddle, there an administrator should be appointed. And that is precisely the state here; namely, that where there is a mesne time, in which the executors cannot or will not execute the testament, the ordinary may commit

(a) This was a gross error; for, as Lord Coke again and again shows, the ordinary had only the custody and care of the assets, and had no power to distribute except, first, to creditors who could sue him if he withheld the assets, and then to the next of kin, who, after creditors, were entitled to their share; and it was only as to the residue, if any, after payment of debts, that the ordinary had any power of distribution; and then the only part that could be applied to pious uses was the dead man's part, as it was called, which ceased when prayers for the dead were abolished.

administration, and his acts shall stand with the intent of the statute, and not be invalidated.

On the contrary, it was argued by the Lords Dyer and Walsh to this effect. They said, that the defendant not having averred the deceased died intestate, it ought to be taken as a confession that a will was made; and the ordinary has no authority unless it was an intestacy. Now the executors are so immediately upon the death, and before the probate, which is but a confirmation and allowance of what the testator had done, and the property of the goods is vested in them; for they may be sued, may alien, and give away before probate; and if so, the law never vests it in the ordinary, and of course not in the administrator; and if there was any doubt of this, it is removed by the probate, which has relation to the death. And he quoted a case in 7 Edward IV., where Littleton said, if a man is made executor without knowing it, the ordinary might well commit administration in the mean time; but presently, by the probate, the power of the administrator is determined.¹ And they said, it appeared by 4 Henry VII., that in a case like this the ordinary ought to have awarded against the executor to come in, and if he would not prove the will, then he might commit administration to others.² But here there is no such caution; and for that reason the probate disproves the administration, not from the time of the probate only, but for the whole of the time. And, therefore, they said, this case was not at all like that of refusal and others put by Weston; for here there was no intermediate time. It was allowed, in the present case, if the sale had been shown by the defendant to have been made by the administrator in discharge of anything which he had been compellable to do, it should not have been avoided; but no such matter being shown, they held the sale void, and that the executor should recover the thing sold.³

The stat. 37 Henry VIII., c. 9, against usury, had been repealed by stat. 5 and 6 Edward VI., c. 20, since which this mischievous practice had considerably increased. The statute of Henry VIII. was therefore revived by 13 Elizabeth, c. 8, and it was thereby, moreover, enacted, that all bonds, contracts and assur-

Usury.

¹ 7 Edw. IV., c. 12, 13. ² 4 Hen. VII., c. 13. ³ 7 Eliz. Plowd., 276.

ances, collateral or other, for payment of principal or covenant to be performed for any usury in lending or doing anything against that act, where above £10 *per cent. per annum* was reserved or taken, shall be void.¹ And because, says the statute, *all usury*, being forbidden by the law of God, *is sin and detestable*, it therefore further enacts, that *all usury*, loan, and forbearing of money, or giving days for forbearing of money, by way of loan, chevissance, shifts, sale of wares, contract, or *other doings* whatsoever for gain, mentioned in that act of Henry VIII., whereupon *is not referred or taken* above £10 *per cent.* for one year, or after that rate, for a greater or less sum, is to be punished by the offender forfeiting *so much as shall be reserved by way of usury above the principal.*² Thus was all interest for money disallowed, and that above £10 severely punished; for, besides the penalty on the principals, all brokers, solicitors, and drivers of bargains for contracts, or *other doings* against the statute of Henry VIII., are to be judged as counsellors, attorneys, or advocates in any case of *præmunire*; ³ and the principal offenders are also to be corrected according to the ecclesiastical laws.⁴ Justices of oyer and terminer, of assize, and of the peace in sessions, mayors, sheriffs, and bailiffs of cities, may determine offences against the statute of Henry VIII.⁵ So much was the legislature sharpened against these practices as to put the cognizance of them in the hands of inferior magistrates, as though they were matters which concerned the very police.

The provisions of stat. 2 and 3 Philip and Mary, c. 7, concerning stolen horses were carried farther by stat. 31 Elizabeth, c. 12 (a). It is by this Stolen horses. act required, that the toll-taker or book-keeper shall take

(a) This is copiously expounded by Lord Coke, and the effect of his exposition is this. At common law the owner of a stolen chattel, on conviction of the thief upon indictment, was entitled to restitution (and by the statute of Henry VIII., in case of appeal), provided there had been no sale in market-overt. But as horses could so easily and speedily be taken to be sold in market-overt, it was thought necessary by this statute to impose several careful conditions and restrictions upon the sale, or rather purchase, of horses even in open market. And these provisions, as he points out, were in pursuance of the principle and policy of the common law as to market-overt, for the common law imposed various conditions in the same part of the statute, as that the sale should really be open and in an open shop, and a shop for the sale of similar articles, etc. (2 *Inst.*).

¹ Sect. 3.² Sect. 5.³ Sect. 5.⁴ Sect. 9.⁵ Sect. 6.

upon him perfect knowledge of the person who sells a horse; or else, the person so selling is to bring a sufficient and credible person, who will testify that he knows him, his name, and place of abode; all of which, together with the name of such witness, and the true price given for the horse, to be entered in a book: a note of which entry is to be given to the buyer, under pain, both to the book-keeper, the seller, and witness neglecting the above directions, or giving untrue testimony, of £5; and the sale to be void. The justices in sessions to have cognizance of these offences. Notwithstanding a sale according to all the above circumstances, an owner may within six months make claim before the mayor or head officer of the town, or before a justice of the peace, near the place, where the horse may then be found; and if he proves within forty days, by two witnesses, that the horse is his, and was stolen, he may take it, upon paying so much money as the then possessor will swear before such head officer or justice he *bonâ fide* paid for it.

Before we enter upon such statutes as made alterations in the ordinary administration of justice, it will be proper to mention some provisions made for determining questions upon policies of insurance (a). When controversies

(a) The statute about to be mentioned deserves particular attention, as affording a precedent of very considerable importance with reference to matters of mercantile litigation. And in the observation of these precedents, and the improvement they may suggest, lies the main interest and advantage of the study of legal history. It will be found that in this, as in many other instances, our older legislation embodied principles just as applicable to our own times, although the particular procedure in which it was embodied may have long become obsolete, and capable of being reapplied in new forms, to the effecting of most considerable and beneficial improvements in our own present procedure. It will be seen that the scope of the measure about to be mentioned was one of compulsory arbitration, founded upon a practice of voluntary arbitration, which less honest parties were often desirous to evade, preferring the delays of litigation to the prompt justice of arbitration. Attention has more than once been called, in the notes to previous volumes of this work, to the important subject of arbitration, which our author unaccountably overlooked. It has been seen that the law, in cases of account, had founded a procedure in the nature of compulsory arbitration before auditors or official arbitrators; and this might well afford a precedent for a tribunal of compulsory arbitration in other mercantile matters of dispute. The procedure by arbitration was peculiarly adapted to such matters: one of the fundamental principles of civil procedure, recognized by our earliest legal authors, being that in mercantile causes procedure should be prompt. Unfortunately the procedure in actions at law (except in actions of account, already alluded to) was rather dilatory, and afforded every opportunity to dishonest debtors for delay. There can be no doubt

had arisen upon these mercantile contracts, they had from time to time been ordered by some grave and discreet merchants appointed by the lord mayor, as persons whose experience better enable them to judge of such matters; but it seems, that of late this course had not been generally liked, and suits used to be commenced in the courts of law against every several insurer, which caused great charge and delay to the parties.¹ It was therefore thought proper to devise some method of deciding these questions more conveniently for all persons interested. A way was marked out by stat. 43 Elizabeth, c. 12, which empowers the chancellor to award a standing commission, to be renewed yearly at the least, for determining causes upon such policies of insurance as shall be entered in the office of assurance in the city of London; which commission is to be directed to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight grave and discreet merchants, or any five of them, who are to examine these matters in a brief and summary course, as they in their discretion shall think meet, without formalities of pleadings or proceed-

that it was in a great degree for this reason that honest litigants resorted as much as possible to arbitration; but it is obvious that, for the same reason, dishonest debtors would avoid it. The difficulty was, that arbitration was essentially a voluntary proceeding, and either party before an award made could revoke. When an award was made, it could indeed be enforced by action, at least in personal matters, though things in the reality could not be recovered upon the award (*Truslove v. Yeane*, 2 *Le.*, 104; *Cro. Eliz.*, 227; *Co. Litt.*, s. 67). Arbitration, however, was resorted to a great deal in this reign, and the usual practice was to enter into a bond to stand to the award (*Barratt v. Fletcher*, *Yelv.*, 152; *Sallowes v. Girling*, *ibid.*, 203). But in the action of account the defendant was driven to an account before auditors assigned by the court (*Sadock v. Burton*, *ibid.*, 202). And it appears that this, coupled with the practice of voluntary arbitration in cases of policies of assurance, had suggested the measure above mentioned, which established a tribunal of compulsory arbitration. For as the tribunal was rather mercantile than legal, it determined both law and fact, and it was intended evidently to go rather on the broad principles of equity, embodied chiefly from the civil law in the law-merchant, and to proceed in the most simple and informal manner, it came virtually to a species of compulsory arbitration. In other cases than actions of account, where the parties were poor and the matter small, it was referred to the arbitrament of the master (*Coxe v. Jennings*, *Yelv.*, 17); and it was obviously beneficial to the parties to refer a mercantile matter to the arbitration of a mixed tribunal of lawyers and laymen, in which the lay element largely preponderated. It might well deserve consideration whether such a course might not be taken in many classes of mercantile cases in our own time.

¹ Sect. 1.

ings. They may warn parties to come before them, examine witnesses upon oath, and commit to prison such as disobey their final orders or decrees. They are to sit at least once a week in the office of assurance, or other public place which they shall appoint. There is an appeal to the chancellor by bill; no commissioner (except the judge of the admiralty and the recorder) is to act without taking an oath before the lord mayor and court of aldermen, to proceed indifferently between the parties.

In reviewing the statutes made respecting the administration of justice, we shall first speak of those which made any change in courts, and next those which regard the process and proceeding in action.

Heretofore all issues joined in the courts at Westminster, and triable in the county of Middlesex, had been usually tried at bar (*a*); and many trifling actions had on

(*a*) That is, before all or several of the judges, which was the ancient practice at the assizes; whence the statute of Westminster, as to bills of exceptions, speaks of "the justices" allowing the exceptions. So in the books of that time mention is made of causes as tried at the assizes, at *nisi prius*, before "the justices of assize." Thus, in the reign after the above statute, it is stated that, "if an assize was taken before the justices of assize, it might be adjourned for difficulty into the court at Westminster, where the judges of assize sat" (*Cromwell's Case*, *Yelv.*, 3). So in the next reign we read that in an ejectment "the cause came to be tried before Yelverton and Croke, justices of assize in a certain county; and at *nisi prius*, before the jurors were sworn, Master Walter, of counsel with the defendant, put in a *plca puis darrein continuance*. And Yelverton moved all the justices in Serjeants' Inn, Fleet Street, and reported their opinions to the King's Bench (though the record of *nisi prius* was returned into the exchequer), viz., that it was in the discretion of the justices of assizes to accept such plea." It was likewise held that they could not receive the replication, but must return it as parcel of the record of *nisi prius* (*Moore v. Hawkins*, *Yelv.*, 180). That is, into the court whence the record came, and where the action was brought. When causes in the courts of Westminster were tried at *nisi prius* at the assizes, they could be adjourned into that court, and judgment would be understood to be given there, as the cause was there, though sent for trial to the assizes. When, however, the cause was tried in London or Middlesex, it was tried of course in the court where it was brought, and hence the whole court sat to try it; and this was a trial "at bar," *i. e.*, at the bar of the court where the action was brought. The result of this was, that points of law of any difficulty could easily be adjourned, or, as we should say, "reserved," upon the evidence, for the further consideration of the judges; and hence arose the practice of "reserving" cases. This was in the discretion of the judges, and was therefore in that respect different from, though it bore some analogy to, the common-law course of demurrer to the evidence, which was *ex debito justitiæ*, and at the will of the party against whom the evidence was given. That course, however, only lay against evidence given on one side, whereas a case could be adjourned or reserved upon evidence given on both sides. But as in that case the evidence was not entered of record, as on a special

that account been brought in the county of Middlesex, in order to obtain a speedy trial. This occasioned great hindrance to the business of importance depending there on demurrer or otherwise, and also imposed an additional weight of duty and attendance on the freeholders who were to try issues there. For these reasons, it was enacted by stat. 18 Elizabeth, c. 12, that thenceforward the chiefs of the three courts, or in their absence two judges of the respective courts, as justices of *nisi prius* for the county of Middlesex, may try all issues which are triable by an inquest of that county, in Westminster Hall, within term-time, or within four days next after the end of every term;¹ and commissions of *nisi prius* are to be awarded as in other cases.

After this new court of *nisi prius* was erected a new court of error for judgments passed in the King's Bench. This was by stat. 27 Elizabeth, c. 8, Error in the exchequer chamber. which, complaining that errors there could only be reformed in parliament, and that was *not in these days so often held as in ancient times* (a); and besides that, the great

verdict or bill of exceptions, it could not be carried into error, nor go beyond the court where the action lay. There can be no doubt that at this time the practice had become established of reserving cases for the court upon the evidence. For in the first year of the next reign we find a case reported by Lord Coke, in which, on evidence to a substantial jury at the King's Bench bar, the case on the evidence was such; and there it is stated that certain points were reserved by the court upon the facts thus disclosed in the evidence (5 *Coke's Reps.*, 25; *Countess of Rutland's Case*). And, indeed, it plainly appears that cases were moved in arrest of judgment, on the evidence (*Playter's Case*, *ibid.*, 35). This was a course easy and obvious enough when the whole court sat; but having been established, it would be not less easy and more necessary when only one sat. Of course, when one judge sat, it would be more important to reserve a case for further consideration; and if it was not desired to carry a case into error, such a course would be as satisfactory and far more convenient than a special verdict. Indeed, all the advantages of a special verdict were obtained by a practice which had arisen of having cases argued before all the judges of all three courts (*Capel's Case*, *Coke's Reps.*, 63; *Shelley's Case*, *ibid.*, 106). The only difference was that a special verdict was, in theory, at the option of the jury, but it was in a manner directed by the judge, and the reservation by his consent came to the same thing. And that cases were so reserved there can be no doubt. After this act single judges tried issues at the assizes (*Hawes v. Lodder*, *Yelv.*, 196), "at the trial at Huntingdon before the Lord Coke," etc.

(a) There was, however, an ancient practice by which, in cases in the King's Bench, whether by error from the Common Pleas or otherwise, the judges of that court could obtain the advantage of the opinion of all the judges before delivering their own judgment, that is, by having the case

¹ By 12 Geo. I., c. 31, s. 1, within eight days after term.

business of the nation took up so much of their time as not to allow sufficient leisure for such examinations, enacts as follows: where any judgment shall be given in the King's Bench (*a*) in debt, detinue, covenant, account, action upon the case, *ejectione firmæ*, or trespass, *first commenced there* (which has been construed to signify actions *upon bill*), other than such where the queen is a party, the plaintiff or defendant, against whom the judgment is, may, at his elections, sue out a special writ to be devised in Chancery, directed to the chief-justice, commanding him to cause the record, and all things concerning the judgment, to be brought before the justices of the Common Pleas and barons of the exchequer in the Exchequer Chamber, there to be examined by them (and barons being of the coif), or six of them at the least; and reversed or affirmed for errors, except only such as concern the jurisdiction of the King's Bench, or any want of form in a writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding. After which, the record is to be brought back to the King's Bench, that further proceeding, as execution, or the like, may be had. But such judgment in error is not to be so final as to preclude the party grieved from suing in parliament for further examination.

Afterwards, there was an act made, 31 Elizabeth, c. 1, in aid of this, and of another, stat. 31 Edward III. st. 1, c. 12, which had erected a court of error in the Exchequer Chamber upon judgments passed in the Court of Exchequer.

argued before themselves and all the other judges (*Capel's Case*, 1 *Coke's Reps.*, 63; *Shelley's Case*, *ibid.*, 106). It appears that this course was not only common, but usual in all cases of difficulty or doubt, though of course it was on the part of the judges voluntary, and was not as a writ of error, which is, *ex debito justitiæ*, in the power of the parties. The practice was, after such argument, for the court of King's Bench to give its own judgment, having formed that judgment with the aid of the other judges (*Chudleigh's Case*, 1 *Coke's Reps.*, 120).

(*a*) It is important to observe that this statute does not seem to have affected the ancient jurisdiction in error as to cases from the Common Pleas, and that such cases could come before all the judges of England, *i. e.*, including the judges of that court, as well as of the other two courts. For there are many reports of cases before and after this statute from the Common Pleas, argued in the Exchequer Chamber before all the judges of England, *i. e.*, as expressly stated in a case after these statutes, the barons of the Exchequer and the justices of the one bench and of the other; and it was then resolved that judgment should be given for the plaintiffs, and afterwards judgment was given in the Common Pleas according to the said resolution (*Cromwell's Case*, 2 *Coke's Reps.*, 71; *Capel's Case*, 1 *Coke's Reps.*, 63; *Shelley's Case*, *ibid.*, 106).

As to the first of these, in consideration that the chancellor and treasurer were great officers of state, and, owing to other weighty concerns, could not always be present in that court, and that writs of error were often on that account discontinued, it enacts that such absence shall not be a discontinuance; but if both the chief-justices, or either the chancellor or treasurer be present at the day of adjournment, the cause shall proceed, but no judgment is to be given unless they are both present. As to the new court, in order to prevent the like discontinuances from a full number of the appointed judges not attending, it empowers any three to award process, and prefix days for the continuance of writs of error; but, as in the former case, no judgment is to be given without a full court, as appointed by the statute.

The removal of causes out of inferior courts (a) was put under some regulation by stat. 43 Elizabeth, c. 5, which is entitled, "An Act to prevent Perjury and Subornation of *Perjury*, and unnecessary Expenses in Suits at Law." The meaning of the former part of which title will be best collected from the practice then common in those courts: a defendant would suffer the cause to go on till they were at issue, the jury sworn, and evidence given on the side of the plaintiff, and then would deliver into court a writ to remove the suit. The keeping back the writ in that manner not only put the

Removal of causes
out of inferior
courts.

(a) One of the most remarkable features in the legal history of this period is the great number of local courts which appear to have existed in the country. It appears that there were such courts not only in the great cities, such as London, Bristol, Exeter, etc., or in lesser cities like Oxford, Cambridge, Coventry, etc., but in almost all towns, boroughs, and even villis. Thus, in the reign of Edward IV., we find a writ of error, on a judgment, given in Coventry, where it is stated the mayor had cognizance of all manner of pleas (*Year-Book*, 22 *Edw. IV.*, fol. 34). So in the *Year-Books* of the same reign we read that Bristowe had a court, with power to attach (or arrest) the person, and that a writ of error lay from it to the court of King's Bench (*Year-Book*, 11 *Edw. IV.*, fol. 10). Cambridge, it appeared, had a charter from Henry III. (*Year-Book*, 2 *Edw. IV.*, fol. 26). All through the reports of this reign mention is found made of local courts, not only in every town or city, but apparently in almost every place in the country,—as Norwich (*Yelv.*, 120), Tewksbury (*Ibid.*, 107), Worcester (*Ibid.*, 103), Shrewsbury (*Ibid.*, 97), Coventry (*Ibid.*, 70), Gravesend (*Ibid.*, 46), Oxford (*Ibid.*, 17). And so of innumerable other places; indeed, it is believed every place in the kingdom. And these courts were in addition to the county courts (*Yelv.*, 2). From all these courts, in one way or another, the proceedings could be removed, either by *recordari certiorari*, or writ of error. (As to *certiorari*, vide 21 *James I.*, c. 23).

party to unnecessary expense, but he thereby came to the knowledge of his proofs, and so obtained time to furnish himself with false witnesses to meet him at another trial.¹ To remedy this, it is enacted, that no writ of *habeas corpus*, or any other sued out of a court of record at Westminster, to remove an action out of a court in any city, town corporate, or elsewhere, shall be received or allowed by the judge or officer, except it be delivered before the jury appear, and one of them is sworn.²

The statutes which made alterations in the process and proceeding of courts we shall consider as nearly in the order in which they were made as is convenient. The first was made to enforce obedience to proceedings in the ecclesiastical courts; the statute 5 Elizabeth, c. 23, makes several provisions respecting the writ of *excommunicato capiendo*. The great defect in this writ was, that it was not returnable into any court which might judge of the due execution of it, but was left entirely to the discretion of the sheriffs and their deputies, through whose negligence it was sometimes not executed at all. It is, therefore, provided by this act, that it shall be made in term returnable in the King's Bench, and to have twenty days at least between the *teste* and return. The writ, when sealed, is to be forthwith brought into the King's Bench, and there opened in the presence of the judges, and delivered of record to the sheriff or his deputy. If the writ be not returned at the proper time, or there be any default or negligence in the execution of it, the sheriff is to be amerced at the discretion of the judges. The body of the party, if taken, is not to be brought into court, but the writ only to be returned, with a declaration of what has been done upon it.

If a *non inventus* is returned, the following process is ordained. A *capias* is to issue, returnable at least two months after the *teste*, with a proclamation, to be made ten days at least before the return, either in the county court, sessions, or assize, for the party to appear in six days: if he does not yield himself, he is to forfeit £10 to the king; upon which another like *capias* and proclamation issues, and then a third, with a penalty of £20 for not appearing, and so on *ad infinitum*. This process always to be in the county

¹ Sect. 1.

² Sect. 2; altered by stat. 21 James I., c. 23.

where he commonly resides. The party, if taken in this manner, is to remain in prison without bail, as if taken upon the *excommunicato capiendo*, reserving to the bishop still to accept submission and satisfaction, and to absolve and release the offender, signifying the same, as formerly, to the court of Chancery. However, all the provisions of this act are restrained to the following cases: where there is a sufficient and lawful addition in the writ of *excomm. capiendo*, according to the statute of additions; and where it appears in the *significavit* that it is upon some cause of contempt, in matter of heresy, refusing to have his child baptized, or to receive the communion, or to come to divine service, or errors in the religion or doctrine now received in the Church of England, incontinency, usury, simony, perjury in the ecclesiastical court, or idolatry.

It was endeavored to prevent the vexation of suitors by stat. 8 Elizabeth, c. 2 (a). It was common to arrest a per-

(a) This was the first of several statutes passed to prevent abuse of process of arrest; the very use of which at all, as it was now established, was a gross abuse. The original process of the common law (except in cases of actual force and violence, such as would be indictable, and might be visited with a fine to the king and imprisonment for the non-payment, so that the party probably might abscond) was summons upon the writ, that is, summons to the party by the sheriff upon a writ issued to the sheriff, commanding him to summon the party to appear. Then a series of statutes, the last of which was one of Henry VII., gave process of arrest, not defining how or when it should be issuable; but the stat. Henry VI. as to bail, founded on previous practice, plainly showed that as the arrest was only to be to enforce appearance, so it ought only to take place on default of appearance on the summons. But on the summons the party might at once appear (*Drew v. Shirley, Yelv.*, 108). But if the defendant did not appear, then there was a necessity for "mesne process," as it was called, however founded on the original writ, to compel him to appear; and when *capias* was given, that process was *capias* for his arrest, which, however, ought to be the second process (*Tushet v. Milton, Yelv.*, 158). For at common law the course was to seize a man's goods to compel him to appear (*Gommersall v. Medgate, Yelv.*, 194); and *capias* was allowed by statute in lieu of such distress, or where it failed. In the King's Bench, where the action might be commenced by a "bill" (in the nature of an original), the mesne process, or process of arrest, was called a "*latitat*," which was not an original writ, but was in the nature of an execution, grounded on a precedent record; that is, the bill for every *latitat* was founded on a bill of Middlesex, where the King's Bench sat, and that the party could not be taken in that county, *quia latitat et discurrit* in another county, or the *latitat* issued on a suit supposed to be depending. But in consequence of the abuse of the use of process of arrest as the first process without summons to the party, it was capable of being abused to the purposes of vexation and oppression, by being issued where really there was no suit depending, and no real claim, complaint, or cause of action. It is obvious that the proper remedy would have been to make it penal to issue process of arrest until default of appearance upon summons; but it would

son by *latitat*, *alias* or *pluries capias*, out of the King's Bench, and by like process out of the Marshalsea, and other courts in cities, and other places, and after that exhibit no declaration; so that the defendant, after being put to charge and trouble, could have no costs awarded against the plaintiff for the vexation: it was, therefore, now enacted, that where any one shall be arrested, or appear, upon the return of any of the above process out of the King's Bench, and shall put in bail, if the person suing do not, within three days next after such bail taken, put in a declaration, or if after declaration he do not prosecute the same with effect, but shall apparently and wilfully suffer his suit to be delayed, discontinued, or shall be non-suit, then the judges shall, at their discretion, award the person so vexed his costs, damages, and charges. The same was enacted¹ with regard to suits in the Marshalsea and other inferior courts.

It is likewise provided, that where any one shall cause another to be arrested at the suit of a person who either did not exist, or did not agree to such proceeding, and shall thereof be convicted by indictment, presentment, or *by the testimony of two sufficient witnesses, or more*, or other due proof, he is to be imprisoned for every offence six months; and before he is discharged, is to pay treble costs and damages to the party grieved, as well as £10 to the party whose name he made use of. So that arresting persons merely from malice, without any cause of action, no longer enjoyed impunity.

The stat. 3 and 4 Edward VI., c. 4, concerning the exemplification, or *constat*, of letters-patent, was, in all its

seem that the abusive practice had become too firmly established, and so a less decisive course was adopted, which failed to repress the abuse. A *latitat* was the peculiar process of the court of queen's bench, founded on a bill of Middlesex (which answered to a bill of chancery), and supposed that the party could not be taken by the sheriff of Middlesex, *quia latitat et discurrit* in another county. So that the *latitat* supposed a suit already commenced and depending. It was not itself an original writ, but was in the nature of execution grounded upon a record precedent. The jurisdiction of the King's Bench between party and party was supposed to be grounded on a trespass or wrong within the proper jurisdiction of the court, *i. e.*, Middlesex; and the rule of the common law required that the original process should be issued into the county where the cause of action arose, whether or not the defendant was there (as he was presumed, in the first instance, to be), and if he was not, then process, grounded upon that original process, had to be issued into the county where he really was (*Everard v. Black*, *Yelv.*, 52; *Wolpeston's Case*, *ibid.*, 51).

¹ Sect. 3.

parts, extended by stat. 13 Elizabeth, c. 6, to the letters-patent of Henry the Eighth, Edward the Sixth, Queen Mary, King Philip and Queen Mary, Queen Elizabeth, her heirs and successors; so that it now became, so far, a general law. To avoid the great and changeable delays often happening to tenants and defendants, it was enacted by stat. 14 Elizabeth, c. 9, that in all cases where the plaintiff or demandant is entitled by any statute to pray a *tales de circumstantibus*, all tenants, actors, avowants, and defendants may, upon their refusal, demand it; and in *qui tam* actions the defendant shall be admitted to have a *tales*. Then follow the two statutes of jeofail, stat. 18 Elizabeth, c. 14, and 27 Elizabeth, c. 5, which we shall speak of presently. The next is stat. 29 Elizabeth, c. 4, for regulating the fees of sheriffs and bailiffs of franchises or liberties in cases of execution (*a*).

The many proclamations directed by stat. 4 Henry VII., c. 24, to be made on fines in the common pleas had so much increased of late years, that the stat. 31 Elizabeth, c. 2, says, it would take up sixteen days in every term to make proclamations upon all the fines there levied; when, on the other hand, the suits there had so much increased, that scarcely one day could be spared for proclaiming fines. That act, therefore, ordains, that fines shall be proclaimed only four times; once in the term wherein it is engrossed, and once every of the three next terms.

This brings us to stat. 31 Elizabeth, c. 3, which was made for avoiding of secret outlawries in personal actions, where the defendant has a known place of dwelling, owing to the proclamations being made in the county court or quarter-sessions at a distance from their abode, and therefore giving them no convenient notice of suits against them (*b*); for remedy whereof, it is

Outlawry.

(a) This was held only to apply to cases of actions between party and party (*Harris v. Peacock*, 1 Salk., 323; *Stephens v. Rothwell*, 3 B. & B., 143).

(b) Outlawry was the remedy provided by the course of the common law in case of failure of process of summons or *capias* to compel a party sued to appear, by reason of its not being known where he was to be found. Summons, at common law, was by leaving notice at the dwelling-house of the party sued; but if either the dwelling was not known or the summons was not regarded, the next process, in personal actions, was either distress on the goods or process of arrest. If, however, the residence was not known, there could hardly be a distress, and it was very likely that the party would not be found, and then these processes would fail. The final remedy was process of outlawry, of which the essence was such public proclamations as

enacted by that statute, that in every personal action wherein an exigent is awarded, there shall issue one writ of proclamation having the same *teste* and return with the exigent, directed to the sheriff of the county where the defendant is then dwelling. Upon which there are to be three proclamations made; one in the county court, one at the quarter-sessions, a third to be made one month at least before the *quinto exactus*, at or near the most usual door of the church of the place where the defendant dwelt at the time the exigent was awarded, upon a Sunday, immediately after divine service; and all outlawries not pronounced according to this statute are made void. As to real actions, it is ordained, that on every summons upon the land, at least fourteen days before the return thereof, proclamations of the summons are to be made on a Sunday in the above manner; and such proclamations to be returned with the names of the summoners. And if this act is not complied with, there is to be no *grand cape*, but *alias* and *pluries* summons until proclamations are duly returned. And before the allowance of a writ of error, or reversing an outlawry by plea or otherwise, for want of proclamations as directed by this act, the defendant shall put in bail, not only to appear and answer in a new action to be commenced, but also to satisfy the condemnation, if the plaintiff begins his suit before the end of two terms after allowing the writ of error, or otherwise avoiding the outlawry.¹ The same provision which had been made by stat. 1 Edward VI., c. 10, for Wales and Chester, and by stat. 5 and 6 Edward VI., c. 26, for the county palatine of Lancaster, was now made by stat. 31 Elizabeth, c. 9, respecting the county palatine of Durham, as to awarding writs of *exigent* and proclamation. They are to be directed to the Bishop of Durham,

might naturally be presumed to bring the suit to the knowledge of the party; and if he still failed to appear, then the judgment of outlawry, which involved forfeiture of goods and also liability to arrest, together with incapacity to sue, and some other disabilities. Now, the object of this statute, as of that of Henry VIII. on the same subject, was to secure that there should be the best notice possible, and that, therefore, if there was a known dwelling of the party sued, the proclamation should be in the county where that dwelling was, and where, therefore, it was most likely to come to his knowledge. If there was no known dwelling, then the proclamations, under the statute of Henry VIII., must be in the county where the cause of action had arisen, and where *prima facie* it might be supposed he dwelt.

¹ Sect. 3.

and during a vacancy to the chancellor of the bishopric or county palatine, who, by mandate, is to direct the sheriff to execute them.

Two very material statutes were made respecting actions upon penal statutes. The first is stat. 18 Elizabeth, c. 5, "to redress disorders in common informers." It is thereby enacted, that no one shall sue another upon a penal statute but by way of information or original action (a). Upon every information a special note is to be made of the day, month, and year of exhibiting it in the office; nor is any process to be sued out till the information is exhibited in form; and upon the process is to be indorsed the plaintiff's name, and the statute upon which it is grounded. Any clerk making out process contrary to these directions is to forfeit forty shillings, half to the queen and half to the party against whom the process is issued.¹ No informer shall compound with a defendant but after answer made in court; nor then but by order or consent of the court. And if an informer delay his suit, or discontinue, or be non-suit, or have a verdict or judgment against him, he shall pay costs,

Actions upon
penal statutes.

(a) The object of this act was the same as that of the 8 Elizabeth (*vide ante*), to protect parties from vexatious process in pretended penal actions, not intended to be really sued and prosecuted; and the course taken is of the same character, only somewhat more stringent, *i. e.*, to require that the information or original writ shall actually be plead or sued out before any process was issued against the party. It is to be observed that an information was a criminal proceeding and an action civil, but when, as in these cases, the action or information was only for a pecuniary penalty, they were both substantially civil proceedings. In trespass, there was a fine which the king could pardon, but this would not affect the right of the party to damages (*Strickland v. Thorpe, Yelv.*, 126), though in an action for forcible entry the pardon of the force would deprive the party of his right to restitution (*King v. Fawcett, ibid.*, 99). The distinction has always been drawn in our law between civil injuries to the individual and criminal acts, which are the subject of prosecution by the crown on behalf of the public, in which the action for the private injury must give way to the public right (*Higgins v. Butcher, Yelv.*, 89). But a man could not have a private action for a public nuisance (*R. v. Taylor, 2 Stra.*, 1167), nor an indictment for a mere private injury (*Rex v. Webb, 1 L. Raym's Reps.*, 737). Proceedings for mere penalties, whether by action or information, have always been deemed civil suits, even when by informers suing *qui tam* in the behalf of the crown, therefore the informer might compound (*Bradshaw v. Mottram, 1 Stra.*, 167), the king's part being first paid (*Crood v. Ellis, 2 Co. Bla.*, 1154). Upon filing an information for a penalty, however, even by a common informer, the right to his share would rest in him, and the king could only pardon his own share of it (*Grossett v. Oliver, 5 B. P. C.*, 527).

¹ Sect. 1.

charges, and damages, to be recovered by *capias, fieri fa.,* or *elegit*.¹ And if any (except the clerks for making out process) offend in suing out process, making of composition, or other misdemeanor, contrary to this act; or shall, by color or pretence of process, or of any offence against a penal statute, make any composition, or take money, reward, or *promise of reward*, he is to stand in the pillory for two hours, be disabled to sue upon any popular or penal statute, and for every offence forfeit £10.

The limitations of this statute are not to restrain informations for maintenance, champerty, buying of titles, or embracery, or where a penalty is *specially* limited to any particular person, nor is this statute to extend to such officers of record as by their office may exhibit informations.²

Other restrictions were imposed on informers by stat. 31 Elizabeth, c. 5, which enacts that in an information the offence shall not be laid in any other county than where it was in truth committed (*a*); and a defendant may plead that the offence was not in the county where it was alleged,

(a) By 21 James I., c. iv., s. 1, it was enacted that all informations, etc., upon penal statutes shall be prosecuted before justices of assize and *nisi prius*, and justices of the peace having power to inquire, hear, and determine, and not in the courts of Westminster, nor in any other place; and that if such prosecution should be in any other place, it should be void. And upon that statute, although it was first held that penal actions were not within it (*Boner v. Hughes*, 1 Vent., 8), yet it was afterwards held that they were, because the justices might proceed in any of the methods mentioned. Hale, chief-justice, agreed with Holt, chief-justice, and thought that there was no difference between an action of debt upon a penal statute and an information, they being only different ways of proceeding to recover the penalty, for that it may as well be received before justices of the peace as by action of debt (*Rex v. Gall*, 1 Lord Raym's Reps., 372). And Holt, chief-justice, said that the statute 21 James I., c. iv., was aimed principally at the court of Star Chamber, which, at the time of the passing of the act, had assumed an exorbitant jurisdiction. But it was held that, if a statute direct that certain offences shall be inquired of only in the sessions, assizes, or leets within the county where committed, and not elsewhere out of the county, yet they may be inquired of in the superior courts, for the statute is not in the negative as to any other court, but only any other county (*Shayle v. Taylor*, Cro. Jac., 178). This was as to the statute James I., which enacted that actions on penal statutes are to be local (*See R. v. Plought*, 3 Mor., 94; *R. v. Reeve*, 1 Bl. Reps., 231). But if an appeal to the quarter-sessions is to be final, no other court can interfere (*Ibid*). Where an action is brought on any subsequent statute, it is not restrained by the statute of James I. (*Rex v. Grant*, 1 Salk., 372; *Heek's Case*, *ibid.*). The statute only applied, moreover, where the party before the act could have tried in the inferior court, *i. e.*, before justices of assize or of the peace, etc. (*Leigh v. Hunt*, 3 T. R., 362; *Shipman v. Herbert*, 4 T. R., 109).

¹ Sect. 3.

² Sect. 5-7.

and if found for him, the plaintiff shall be barred of his action.¹ There is the like exception of officers of records, informations of champerty, buying of titles, or extortion, actions upon two particular acts made for collecting the customs,² and, in general, all informations for concealing or defrauding the customs, tonnage, poundage, subsidy, impost, or prisage, for corrupt usury, engrossing, or for regrating or forestalling, where the penalty is of the value of £20 or above.

All actions, indictments, or informations for a forfeiture, when limited to the king, are to be brought within two years; when to the king and any other who shall sue, within one year; and, in default of such suit, the king may sue within two years after that year ended. It then repeals stat. 7 Henry VIII., c. 3, concerning the time of bringing actions upon penal statutes, and confirms all others in force upon the subject of reforming disorders of common informers.³ And it further directs that all suits upon any statute for using any unlawful games, or for not using any lawful game, for not having bows and arrows according to law, or for using any art or mystery, in which the party has not been brought up, according to stat. 5 Elizabeth, c. 4. All these are to be sued in the general quarter-sessions or assizes where the offence was committed, or in the leet, and not in anywise out of the county⁴ (a).

(a) Thus the 21 James I., c. ii., reciting that offences against penal laws may be better and with less charge commenced, sued, and prosecuted in the counties where such offences shall be committed, enacts that all offences against any penal act for which any promoter may ground any action, bill, plaint, suit, or information before justices of assizes, *nisi prius*, gaol-delivery, and shall be sued by any action, plaint, bill, information, or indictment, before justices of the assize, etc. Then the stat. 1 James I., c. xxii., gave certain penalties to be recovered (s. 46) by action of debt or information in the courts at Westminster; and the 50th section gave jurisdiction to the justices of assize, of gaol-delivery, and of the peace, to inquire of the premises and to hear and determine the same; under the latter clause the inferior courts could only proceed by indictment or presentment. And it was held the informer might bring an action of debt in the courts at Westminster, notwithstanding the 21 James I., c. iv.; for that statute only restrained the proceedings on penal statutes in the superior courts, where the informer, before the passing of that statute, might have sued in the inferior as well as the superior courts, by action, bill, plaint, suit, or information (*Shipman* q. t. v. *Henbest*, 4 T. R. 109). The 21 James I., c. iv. and c. xii., made further provision for securing to parties sued on penal statutes the benefit of local trial; but it has been held that an action by the party

¹ Sect. 2.² 1 Eliz., c. 11 and 20.³ Sect. 1, 7.⁴ See stat. 21 James I., c. 4.

The statutes of jeofail, before alluded to, contributed very much to expedite the pursuit of judicial redress. The first of them, stat. 18 Elizabeth, c. 14, enacts, if any verdict of twelve men or more shall be given in any action, suit, bill, or demand, in a court of record, the judgment thereupon shall not be stayed or reversed by reason of any default in form, or lack of form touching false Latin, or variance from the register, or other defaults in form (a), in a writ original or judicial, count,

Of jeofails.

grieved under the 1 and 2 Philip and Mary, c. xii. (as to extortion or a distress), was not within the above act, 31 Elizabeth, c. v., or 21 James I., c. iv., s. 2, and therefore that the *venire* might be laid in any county (*Fife v. Bousfield*, 13 L. J. and B., 306). But it has been held that an action against a magistrate, for an act done by virtue of his office, is a local action; and, therefore, if the same be laid in one county, or division of a county, and it appears that the cause of action arose in another, the defendant will be entitled to a verdict under 21 James I., c. xii., s. 5 (*Atkinson v. Hornby*, 2 C. J. K., 3357).

(a) This act was only rendered necessary in consequence of the narrow-minded decision of the judges on the act of 32 Henry VIII., c. xxx., that it did not extend to counts or declarations. The decisions of the judges on the statute virtually nullified it, as they had nullified the previous statute. For it was actually held, that in an action of trespass for taking the plaintiff's fish, after a verdict for the plaintiff, judgment must be arrested, because the declaration did not state of what nature the fish were, whether pikes, tenches, breams, carp, etc., and, moreover, that their number did not appear; as if either their nature or number could matter a straw, the jury having on the evidence found the damage the plaintiff had sustained. In vain this was argued, and in vain it was urged that the omission of the number and nature was but of the form, and not the substance, and that the substance was the taking of the fish. But it was resolved that the plaintiff could not have judgment (*Playter's Case*, 5 Coke's Reps., 35). Upon this statute it was also held that it did not any more than the 32 Henry VIII., extend to cure any insufficiency of trial by reason of error or deficiency in the *venue*; and thus, for instance, when the *venue* ought to have been from three villis, and it was only from one, it was held to be error, and not to be cured by this act (*Baynham's Case*, 5 Coke's Reps., 36). So it was held, that though the statute expressly cured the want of an original writ (which was of no earthly use), yet that if there was one, and it varied from the declaration, if any, in a *venue*, the judgment should be reversed (*Bishop's Case*, 5 Coke's Reps., 37; *Dismo v. Shelley*, Yelv., 108; *Thomson v. Falstow*, *ibid.*, 108, 109). A statute construed in such a manner and spirit of course produced but little result, and hence the necessity for further statutes on the subject. Thus the statute was made of no effect; and in the reign of Queen Anne another act was passed with the same object. It was held upon this statute, that matters of form, or rather of formality, as the formal conclusions of pleading, were not fit to be raised upon general demurrer, and required to be specially objected. And Hale said, "It were well the causes of demurrer were always assigned specially. The old way was when pleadings were drawn at the bar, to make the exception immediately, and the other party might mend, if he pleased, or might demur, if he durst venture it. And though now they are but in paper, yet such a course should be observed, for

declaration, plaint, bill, suit, or demand; or for want of an original or judicial writ; or by reason of any imperfect or insufficient return of a sheriff, or other officer; or for want of a warrant of attorney; or by reason of any manner of default in process, upon or after *ad prier* or *voucher*. This act, however, is not to extend to any appeal, indictment, or presentment of felony, or treason, or other matter, nor process thereupon, nor to a suit upon a popular or penal statute.

This statute was intended to take away all trifling impediments to the effect of a suit, after the merits had been decided upon by *verdict*. The stat. 27 Elizabeth, c. 5, had the like design, when the merits had been considered in

demurrers were not designed to catch men. The not concluding to the county seems, it was added, but to be matter of fact, and the demurrer should have been *quia non bene concludit* (*Clerc v. Bailey*, 1 *Ventris Reps.*, 240). The principle after this statute was often recognized, that after verdict the courts should consider the substance. Thus where the plaintiff showed that he was possessed of a house in London, in which one Sebastian had a chamber; that Sebastian was indebted to him, and died possessed of the chamber, and of sundry writings, etc., and that the plaintiff, for recovery of his debt, attached the goods; and that the defendant, in consideration that the plaintiff would permit him to enter the chamber and take away a certain writing, promised to pay him his debt, which being denied, and found by the jury, the defendant objected that there was no consideration, because, for anything that appeared, the debt might be a will, but the defendant not being executor or administrator, could not be chargeable; and that as for the attachment, it must be void, for there was no one sued. But the court said, that the attachment was not the "substance of the action," and that the consideration was, that the plaintiff should permit the defendant to enter the chamber and take away the writing, which was a good consideration (*Pickard v. Cottels*, *Yelv.*, 56). By 21 James I., c. xiii., no judgment shall be stayed or reversed after verdict, by reason the *venire* is sued out to more or fewer places than it ought, so as some one place be right named; nor by 16 and 17 James I., chap. ii., c. viii., if the cause were tried by a proper jury of the county or place where the action is laid. So by 4 and 5 Anne, c. xvi., it was provided that a jury panel need not contain the name of any hundredor, and that a jury might come from the body of the county where the *venire* is laid (*Et vide*, 3 *George II.*, c. xxv.). Before these acts the vill of every material fact was laid, that if any issue arose thereon some hundredor might come thereupon. And if it appeared on the record by the pleadings that in a local action the *venue* was in a foreign county, or, in a transitory action, that it was laid or tried in a different county from that in which the matter in issue arose, there would be ground of error or mis-trial (*Harding v. Sherman*, *Cro. Eliz.*, 510). And so, if the matter arose in two counties, the jury were not from both. This would be inconvenient, though perhaps practicable, so long as pleading was single, but when the act of Anne allowed of several pleas, so that there were always several issues, it became impracticable, and the law was altered accordingly, so as to allow of a jury from the body of the county wherein the *venue* was laid.

another way, namely, upon *demurrer* (a); it enacts, that after demurrer joined and entered in any action or suit in any court of the record within the realm, the judges shall proceed, and give judgment, as the very right of the cause and matter in law shall appear, without regarding any imperfection, defect, or want of form, in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall *specialy* and particularly set down and express, together with his demurrer; nor shall judgment be reversed by error for any of the above causes not so set down and expressed; all which the court may, from time to time, amend. This act, as well as the former, is not to extend to criminal prosecutions, and acting upon popular and penal statutes. After this act there grew a distinction between demurrers, which were some *general*, and some *special*; and many questions arose both from this and the former, what was *form* and what was *substance*. So that, though particular cases were helped by virtue of these acts, yet the debate upon points of pleading was, perhaps, increased rather than diminished; only much of this debate appeared in a new shape, and the matter was considered with different view and design.

For avoiding the number of small and trifling suits commenced in the courts of Westminster, which, by the due course of the law, ought to be determined in inferior courts, it was enacted by stat. 43 Elizabeth, c. 6, that if any sheriff, under-sheriff, or other person having authority, or assuming it, to break writs, shall make a warrant, as upon some process, not having such process; then, upon complaint to the justices of assize, or the judges of the court whence the process issued, not only the person making the warrant, but all procurers thereof, shall be sent for, by attachment or otherwise, and examined upon their oaths; and if it is proved by sufficient witnesses, or confession, they are to be sent to the gaol of the county, or

(a) And this also, like the previous statute, was rendered of no effect by reason of the narrow construction put upon it by the judges. It is to be observed that up to this time the pleadings had been oral, and so as any defect in form was instantly amendable without any expense: the exaction of the most perfect precision in pleading could be of no prejudice to the parties. But now pleadings were put into writing and delivered, and the expense and delay of demurrers became a very serious obstruction to justice where the objections taken were merely formal.

court where it is examined, until they have paid to the party grieved £10, with costs and damages, to be ascertained by the court which heard the matter; besides which, every offender is to forfeit £20 to the king. Another clause of this act ordains (a), that if upon any

(a) This was the first of a series of statutable enactments designed to repress trifling actions by deprivation of costs. The spirit of the Statute of Gloucester, *temp.* Edward I., which first gave the right to costs, was, as the scope of that statute plainly shows, that costs should be recovered where the plaintiff recovered something real and substantial. But it was discovered that actions were brought by parties, either from a spirit of litigation, or by the instigation of attorneys, for the sake of the costs; and it was desired to check this class of actions by depriving the plaintiffs of costs. The act, therefore, in the first place, did not apply to real actions at all, in which *land* was recovered. Next, it applied to *all* personal actions in which less than a certain sum was recovered; and, lastly, it fixed that sum at forty shillings, because that was the limitation fixed by the Statute of Gloucester as to suits fitted for the superior courts, and upon which a rule of practice grew up, that those courts would stay personal actions for less than forty shillings as beneath their dignity. And that was also the limitation of the jurisdiction of the county courts (as of most local courts) without a writ of *justicies*. The value of money, indeed, had fallen enormously since the time when that limitation of jurisdiction was originally established, and forty shillings in the time of Elizabeth was ten times less than it was in the time of Edward I. But that only shows that the legislature was not disposed to place too strict a limitation upon the power of suing in the superior courts, and was only desirous to punish the most trivial class of actions. It will be observed that the actions were only *punished*, not *prosecuted*, and parties were left at liberty to sue in the superior courts for such small sums in cases they deemed to be of such importance that they were willing to pay the costs of suing. In later statutes on the subject, however, special provision was made for certain classes of actions, in which it might be reasonable to sue in the superior courts, even for such small sums; as, for instance, where the action was to try title, or the trespass was malicious. This statute, it is to be borne in mind, applied to all forms of action; and though as to actions of tort it has been superseded, it is still in force as to actions of debt or contract. It is to be observed that the statute at the end says, "less at the discretion of the courts," for although the jury gave damages, it was for the court to award the costs, for no evidence for costs could properly be given to the jury, forasmuch as it depends on the usage of the court in which the suit is (*O'Kelly v. Salton, Yelv.*, 171). But under this act the rule was to allow no more costs than damages (*Walker v. Robinson*, 1 *Wils.*, 93; 2 *Stra.*, 1232). Other statutes carried out the object of the present. But in 8 and 9 William III., c. xi., s. 1, for the preventing of wilful and malicious trespasses, it is enacted, that in all actions of trespass wherein at the trial of the cause it shall appear and be certified by the judge upon the back of the record that the trespass of which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover his full costs, notwithstanding the Statute of Charles. Hence these three statutes, 43 Elizabeth, 22 Charles II., and 8 and 9 William III., c. xi., were as to actions of trespass *in pari materia*, until Lord Denman's Act, 3 and 4 Victoria, c. xxiv., repealed the 43 Elizabeth as to actions of trespass, and the 22 Charles II. as to all personal actions. In further pursuance of the policy of the wise and salutary measure to discourage actions for trivial causes, the Statute of James I., c. iii.,

personal action commenced in the courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for a battery, it appears to the judges of the court, and shall be so signified by the justices before whom the same is tried, that the debt or damages shall not amount to forty shillings or more, then there shall not be awarded more costs than damages, but less, at the discretion of the court.¹

provided: 5. And be it further enacted, that in all actions of trespass *quare clausam fregit* hereafter to be brought, wherein the defendant or defendants shall disclaim in his or their plea to make any title or claim to the land in which the trespass is supposed to have been done, and the trespass be by negligence, or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence, or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue. And of course if the defendant sustained the plea, that is, showed that the amends were sufficient, etc., the plaintiff would have to *pay* all the costs after the plea, that is, all the costs of trial.

¹ Extended to counties palatine by 11 and 12 William III., c. 9.

CHAPTER XXXIV.

ELIZABETH.

CRIMINAL LAW—OFFENCES AGAINST RELIGION AND THE STATE—
STATUTE 13 ELIZABETH, OF TREASON—JESUITS AND SEMINARY
PRIESTS—SECTARIES—THE FIVE-MILE ACT—COMMON OFFENCES—
CUTPURSES AND PICKPURSES DEPRIVED OF CLERGY—PURGATION OF
CLERKS ABOLISHED—HOUSEBREAKERS DEPRIVED OF CLERGY—OF-
FENCES AGAINST THE COIN—GYPSIES—WITCHCRAFT—WANDERING
MARINERS AND SOLDIERS—PERJURY—FORGERY—PUNISHMENT OF
THE FATHER OF A BASTARD CHILD—OF HUE AND CRY.

IN reviewing the penal laws of this reign we find the
I greater and more striking part of them to be such as
were the consequences of the late change in
religion (*a*). A new description of delinquents

Criminal law.

(*a*) That is to say, the queen's change of it, and her attempt to impose it upon her subjects. This naturally excited discontent and disaffection, and then this disaffection was made the pretext for more severe penal laws. Our author appears to have been disposed to excuse, and to have considered the excuse sufficient; but if it were so, then persecution on account of religion could always create its own excuse. It has been seen in the former chapter that the crown had assumed and exercised a spiritual supremacy. The mere assumption and assertion of the royal supremacy in the established church would not have excited discontent. The disaffection was occasioned by the attempts to exercise it over the whole nation. In other words, the queen claimed, by virtue of the supremacy, to dictate to all the subjects of the realm what their religion should be, and to punish them by fine and imprisonment if they did not adopt it, and to punish them even unto death if they dared to oppose it. Such was the scope of these penal laws upon religion. The earlier measures of this reign, mentioned in the previous chapter, were directed to the maintenance of the established form of faith and worship; but the measures noticed in this chapter, passed at a later period of the reign, were directed at the faith and worship of those, whether Papists or Puritans, who would not adhere to the church established by law, and would not admit the right of the crown to impose its religion upon them. It might be possible to enact competent laws to enforce the royal supremacy over the established church, and to punish those who resisted it, or asserted the papal supremacy over that church, and yet to leave men, not members of that church, free to pursue their own form of faith or worship. And during the earlier part of the reign, it will be observed, the legislation on the subject was restrained within that limit. But the spirit of the dynasty was one of such relentless despotism that it would not allow men freedom of choice even in matters of faith and worship: and hence at last the legislation of the reign gradually, in accordance with that

originated from thence, who occasioned great alarm in the government, and were thought to demand the severe

of Henry VIII., assumed the form of persecution, enforced uniformity of religion on the whole community, and enforced it by penal laws against all who varied from it, whether Protestants or Catholics. It is impossible not to see here, as in the previous reigns of the dynasty, that the governing spirit of that persecution was not so much religious bigotry as regal tyranny. Men were punished not for following a wrong form of religion, but for following a form of religion different from that of the sovereign. Hume truly observes that the proceedings upon this subject, at this period of the reign, show the extent of the royal power during that age, and the genius of the government: Religion was a point, he says, of which the queen was, if possible, more jealous than of matters of state. "She pretended that in her character of supreme head of the church, she was fully empowered by her prerogative alone to decide all questions which might arise with regard to doctrine, discipline, or worship, and she never would allow her parliaments to take these points into consideration" (*Hist. Eng.*, c. xl.), *i. e.*, except to pass penal laws at her bidding to enforce her will. Her adherents of the new opinions had been eager enough to acquiesce in the destruction of the papal supremacy, but had no idea of substituting the royal supremacy in its place; but they found it enforced with intolerable tyranny. The queen rigidly insisted on the strictest logical development of the doctrine of the royal supremacy, which vested it in the sovereign, not in parliament. She took care to have a law for uniformity strictly enacted, and she continued rigid in exacting an observance of the established laws, and in punishing all nonconformity (*Hist. Eng.*, vol. v., c. xl.). The zealots, therefore, who harbored a great antipathy to the episcopal order, were obliged, in a great measure, to conceal their sentiments, and they confined their avowed objections to the surplice, etc., kneeling at the sacrament, etc. These controversies had already excited such a ferment among the people that in some places they refused to frequent the churches. And while the sovereign authority checked these excesses, the flame was confined, not extinguished; and burning fiercer from confinement, it burst out in the succeeding reigns to the destruction of the monarchy and church (*Ibid.*). So much for the laws against the Puritans. Still, more severe laws were passed against the Papists. It was declared treason to assert that the queen was a heretic or schismatic. It was also enacted that whoever should publish bulls or rescripts of the pope, or should, by means of them, reconcile any man to the Church of Rome, they, as well as those so reconciled, should be guilty of treason: that is, any one becoming converted to Catholicism should be hanged and quartered with all the horrible abominable atrocities attending an execution for treason. A similar law was also enacted against Jesuits and Popish priests. It was ordained that those who remained in the kingdom, or returned to it, should be guilty of treason, and suffer the same dreadful and horrible penalties. "By this law," says the historian, "the exercise of the Catholic religion, which had formerly been prohibited under lighter penalties, was totally suppressed. In the subsequent part of the reign, the law was sometimes executed by the capital punishment of priests; and though the partisans of the queen asserted that they were punished for their treason, not their religion, the apology must only be understood in this sense, that the law was enacted on account of the treasonable views and attempts of the sect, not that every individual who suffered the penalty of the law was executed of treason. The Catholics might now, therefore, with justice complain of a violent persecution" (*Hume's Hist. Eng.*, vol. v., c. xli.). He adds, that in ten years fifty priests were executed under this law. At a

restrictions imposed by many laws, which, at this time, appear oppressive and sanguinary. However, the temper

later period of the reign, the queen declared her purpose in summoning parliament was to have laws enacted for the further enforcement of uniformity in religion, that is, to enforce conformity to *her* religion, for she would not allow parliament any voice in the matter (*Ibid.*, c. xviii.). Nothing could exceed the slavish servility of parliament. The queen having thus expressly pointed out what the house should and should not do, the commons were as obsequious to the one as to the other of her injunctions. They passed a law against recusants, such as was suited to the persecuting spirit of the age, and the severe character of the sovereign—it was entitled, “An Act to retain Her Majesty’s Subjects in their due obedience,” implying that adherence to the religion of the state was part of the duty of the subject. It was actually enacted that any person who obstinately refused during a month to attend public worship, should be committed to prison, and that upon a renewed offence he should *suffer death* as a felon! This law bore equally hard upon the Protestants and upon the Catholics, and had it not been imposed by the queen’s authority, was certainly, in that respect, much contrary to the private sentiments of the majority in the house (*Hume’s Hist. Eng.*, vol. v., c. xliii.). The queen was absolute in matters of religion, as in all matters of state. The parliament pretended to enact laws, but the queen prohibited them from meddling with state matters, or ecclesiastical causes, and sent members to prison who transgressed her imperial edicts in these respects. And in reality the crown possessed full legislative power by means of proclamations, which might affect any matter, even of the greatest importance, and which the Star Chamber took care to see more rigorously executed than the laws themselves. The queen’s prohibition of the prophesyings or assemblies, instituted for fanatical prayers and conferences, shows the unlimited extent of the royal prerogative. No number of persons could meet together in order to read the Scriptures and confer about religion, though in ever so orthodox a manner, without her permission (*Hume’s Hist. Eng.*, vol. vi., App. iii.). Nothing could more strongly show how absolute, how entirely arbitrary, was the power of the crown even in matters of religion, and that all the measures on the subject were the result of the royal authority, and reflected only the royal will. They were sanctioned by statutes, but the statutes were dictated by the crown, and were but the registered edicts of a tyrant. That the spirit of persecution under Elizabeth, as under Henry, was born, not of sincere religious bigotry, but of the love of tyranny, was shown in the one reign as in the other by this, that it was displayed against the members of any religious body who did not conform to the religion of the crown. In the reign of Elizabeth, as in that of Henry, the Puritans were persecuted as well as the Papists, and the engine used for their persecution was the Star Chamber, so firmly established under Henry VII. The publications which issued from the Puritans, were forbidden by decrees of the court of Star Chamber. Proclamations were issued against the printers, and even readers of books unlicensed by the ordinary. After several deprivations and depositions by the commissioners who executed the queen’s authority as ruler of the church, assemblies of Puritans were dispersed, and those persons arrested and charged with absence from the parish church and having used a form of worship different from that enjoined by lawful authority. Several of them who refused to submit were imprisoned, but soon released; thus began in England the persecution of Protestants by their fellow-dissenters from the Church of Rome (*Ibid.*). The principle of intolerance was affirmed by deeds as well as by words. The minor machinery of persecution was put together and set up, and brought into activity (*Ibid.*). And all this, entirely

and designs of these nonconformists were such that not only religion, but the safety of the state was interested in

to enforce the royal will, and produce a uniformity which could only result from tyranny. Persecution went on equally against Papist and Puritan; and this shows not only that it did not arise either from honest religious bigotry, nor from any notion of necessity. An act was passed subjecting all clergymen to deprivation unless they subscribed all the articles imposed by parliament, *i. e.*, really by the crown; and Puritan congregations continued to be dispersed and their members apprehended, on the ground that they were unlawful assemblies (13 *Eliz.*, c. xii.). And at the same time, it was made high treason to obtain or receive from Rome any bull or writing whatsoever — a persecuting enactment, which reduced Catholics to the alternative of exposing themselves to death or foregoing many of those relations of life which were, in their opinion, only legitimated by the intervention of papal authority (*Mack. Hist. Eng.*, vol. iii., c. vi.). The historian, as already observed, does not mention the many executions, especially of priests, which took place under these laws against the Catholics, merely for maintaining the spiritual supremacy of the see of Rome; but the deficiency is supplied by Lingard, who shows that the indictments in some cases remain, and leave no doubt that the victims suffered merely for the denial of the royal supremacy in spiritual things (*Lingard's Hist. Eng.*). And as men were hanged under Elizabeth for denial of the royal supremacy, so they were burnt for denying the tenets of the royal religion. Speaking of the act of the 13 Elizabeth, Mackintosh says, "The compass and cruelty of this law may be judged from the provision that to call the queen heretic or schismatic should be held and punished as treason. The first victim to the law — a priest — was executed. His offence was religious, not political. A gentleman, guilty of harboring him, was sentenced to perpetual imprisonment (*Ibid.*, c. 5). Campion, for a work in support of the papal supremacy, *i. e.*, its spiritual supremacy, was tortured by the rack, and then, with three priests, was executed" (*Ibid.*). Several other victims of the same class, discovered lurking or disguised through the country, were executed, and at one time as many as seventy Roman Catholic priests were under sentence of death, or awaiting it (*Cumden*). The persecution of the Puritans did not proceed to such an extent. The blood of sectaries (says Mackintosh) was shed; but the victims were merely unrecognized fanatics, not members of the great Puritan community. The Puritans were too highly patronized, powerful, and independent to be proscribed, tortured, and hanged like the Roman Catholics (*Mack. Hist. Eng.*, vol. iii., c. v.), but the more obscure sectaries suffered death in her reign. The Star Chamber and high commission, though arbitrary jurisdictions, had still some pretence of a trial; but there was a very grievous punishment generally inflicted in that age, without any other authority than the warrant of a secretary of state or the privy council, and that was imprisonment in any jail, and during any time that the ministers should think proper. In suspicious times all the jails were full of prisoners of state, and these unhappy victims of public jealousy were sometimes thrown into dungeons and loaded with irons, and treated in the most cruel manner, without their being able to obtain any remedy from law. This practice was an indirect way of employing torture. But the rack itself, though not admitted in the ordinary execution of justice, was frequently used upon any suspicion by authority of a warrant from a secretary of state or the privy council (*Hume's Hist. Eng.*, vol. v., App. iii.). It was very usual in Queen Elizabeth's reign, and probably in all the preceding reigns, for noblemen or privy councillors to commit to prison any one who had happened to displease them by suing for his just debts, and the unhappy person, though he

the suppression of them: upon that idea we may account for the apparent want of moderation in some of these

gained his cause in the courts of justice, was commonly obliged to relinquish his property in order to obtain his liberty. Some, likewise, who had been delivered from prison by the judges, were again committed to custody in secret places, without any possibility of obtaining relief, and even the officers and serjeants of the courts of law were punished for executing the writs in favor of these persons. Nay, it was usual to send the people by pursuivants, a kind of harpies who then attended the orders of the privy council and high commission, and they were brought up to London, and constrained by imprisonment not only to withdraw their lawful suits, but also to pay the pursuivants great sums of money. The judges in the 34th of the queen complained to her majesty of the frequency of this practice. But even these very judges who thus protected the people against the tyranny of the great, expressly allow that a person committed by special command of the queen was not bailable (*Hume*, vol. v., App. iii.). It was considered clear law, not only before but after the Revolution, that the privy council could commit for treason or sedition, or offences against the state (1 *Anderson*, 297); and it was judicially held that persons so committed, even by one of the privy council, ought not to be discharged; which Holt said was good law, and was resolved at a meeting of the judges for asserting the liberty of the subject (1 *Lord Raym.*, *Reps.*, 65). There was, indeed, this distinction, that if a man were committed by one of the privy council, the cause of the commitment ought to be specified, but that if by the whole council it was not necessary (1 *Leon*, 71), which, however, was altered by the *habeas corpus* act. From this arose the practice of secretaries of state to commit for treason or sedition, which Holt, C. J., said was looked upon to be so clear law that it was never drawn in question in his memory but once at the bar (*Rex v. Kendal*, 1 *Lord Raym.*, *Reps.*, 65). And then another judge said that commitments by secretaries of state had been made more than a hundred years (*Helyard's Case*, 2 *Leon*, 75). The penal laws against Roman Catholics were at the same time sharpened and multiplied by fresh enactments, and by the employment of spies and informers—those worst instruments used in the worst days of Rome—as to render it impossible for Catholics to live under them in safety. False denunciations and forged examinations subjected the most conspicuous to examinations before the privy council, deprivations of right, or committal to the Tower (*Ling.*). A single instance may suffice as an illustration. The conviction of Throgmorton upon confessions obtained from him by deceitful promises and the fear of torture, shows that in England, at this time, life was as insecure as under the most implicit and barbarous despotism of the east or west (*Ibid.*). Such was the state to which England was reduced under the Tudors, such the result of a century of royal tyranny under this oppressive dynasty. The same spirit of tyranny will be found to pervade the reigns of every sovereign of the race, and the foundations of it will be seen to have been raised in the present reign. The true scope of these penal statutes of Elizabeth is not only of great historical interest, but has a close connection with the subject of the true scope of the statutes as to the supremacy, a question of great interest in our time. The apology made for the penal acts of Elizabeth was first made for her by Walsingham, in a letter to be found in Burnet, vol. ii., p. 653. "Her majesty, at her coming to the throne, though she suffered but the exercise of one religion, yet her proceedings towards the Papists were with great lenity; and therefore she revived not the laws of the 28 and 35 of Henry VIII., whereby the oath of supremacy might have been offered to every subject, and tempered her law so as it restrained every manifest disobedience in impugning

statutes. The subject of the queen's dignity and authority went hand in hand with that of religion; and so much

and impeaching her supreme power, maintaining and extolling a foreign jurisdiction" (i. e., the papal spiritual jurisdiction, in place of which it is plain she deemed her own to be substituted); "and as for the oath, the hardness of the name of supreme head was removed, and the penalty of the refusal thereof turned only to disablement to take any promotion or exercise any charge. But afterwards, when Pius Quintus excommunicated the queen, and the bull of excommunication was published in London" (which, be it observed, was in 1570), "whereby her majesty was in a sort proscribed, and that thereupon, as upon a principal motive or preparative, followed the rebellion in the North" (which, be it noted, was in 1569, the year before the bull, and the cruel suppression of it was one of the grounds of the bull), "yet because the ill humors of the realm were by that rebellion partly purged" (by the slaughter, as Hume says, of about 800), "she contented herself to make a law against the special case of bringing in papal bulls," etc., that is, the act 13 Elizabeth, cap. ii.; "whereupon was added a prohibition upon pain, not of treason, but of an inferior degree of punishment against the bringing in of the *Agnus Dei*, etc. In all other respects her majesty continued her former lenity; but when, about the 20th year of her reign, she discovered in the king of Spain an intention to invade her dominions, and that a principal part of the plot was to prepare a party within the realm that might adhere to the foreigner, and that the seminaries began to blossom and to send forth daily priests and professed men, who should, by vow taken at shrift, reconcile her subjects from their obedience — yea, and tried many of them to attempt against her majesty's sacred person — then were these new laws made for the punishment of such as should submit themselves to such reconciliation, or renunciation of obedience." As to which, it is to be observed in passing, that, as Walsingham was very well aware, no new laws were necessary to make it treason to attempt or concert anything against the life or even the crown of the sovereign; and, being quite aware of this, he proceeds artfully to suggest some apology for the new laws against the Roman Catholic religion, and he resorts to the old and crafty plea of tyranny — expediency. "And because it was treason carried in the clouds, and in wonderful secrecy, and came seldom to light, and that there was no presuspicion thereof so great as the recusancy to come to divine service, because it was set down by their services that to come to church before recantment was schism, but after recantment was heretical and damnable, therefore there were added laws containing punishments pecuniary, i. e., such as might not enforce consciences, but to enfeeble and impoverish the means of those upon whom it resteth indifferent and ambiguous whether they were reconciled or not; and when, notwithstanding all these provisions, the poison was dispersed so secretly as that there were no means to stay it but by restraining those that brought it in, then, lastly, there was added a law whereby those seditious priests of new creation were exiled, and those that were within the land shipped over, and so commanded to keep hence upon pain of treason" (*Burnet's Hist. Reform.*, vol. ii., p. 53). It would be of little consequence here to expose the flagrant falsities of this crafty apology for cruelty and tyranny (which is, indeed, as such pleas must necessarily be, a tissue of falsehoods), or that the obvious motive and design of these misrepresentations was to obscure and disguise the real truth that these new penal laws were laws against religion, and directed against the maintenance of the spiritual supremacy of the pope, on account of its opposition to the supremacy claimed by the crown; so that the scope of the statutes clearly establishes that the royal supremacy was in its nature, like the papal, spiritual. If, indeed, the penal laws had

was the protection of the one considered as conducive to the safety of the other, that a statute,¹ which contains

begun after the papal bull of excommunication and deposition, there might have been some excuse, though still no sufficient reason, for a penal law against those as published any such bull, though for such law there would probably be no necessity, as the publication of such a document would probably have been held an overt act of high treason, at all events, if it could be connected with any rebellion subsequent. And hence the anxiety of Walsingham, as the apologist of Elizabeth, to make out, not only that the first of the new penal laws was after the papal bull, but that the bull was before the rebellion. Yet the notorious facts of history are, on the contrary, that the rebellion was in 1569, and the bull in 1570; that the rebellion was caused by the tyrannical assertion of the royal supremacy, and the consequent suppression of the ancient religion, and that the bull recites these as the cause and ground of deposition. Hume says, speaking of the rebellion in the North in 1569, "no less than 800 persons are said, on the whole, to have suffered by the hands of the executioner" (c. xi.); and Lingard states: "the survivors were pardoned on condition that they should take, not only the oath of alliance, but also that of supremacy" (*Hist. Eng.*). And Mr. Soames quotes from Camden to the like effect. Now, the bill was in 1570, and it was published in that year, and it recited as its grounds: first, that the pope was supreme governor of the Catholic Church, "regnans in excelsis, unam sanctam catholicam et apostolicam ecclesiam . . . uni soli in terris, apostolorum principi Petro Petrique successori Romano pontifici in potestatis plenitudine tradidit gubernandam;" and next, that Elizabeth was not lawful queen, "inter ceteros flagitiorum serva Elizabeth prætensa Angliæ regina," etc.; thirdly, that she assumed the headship of the church in England, and a spiritual supremacy (which is clear from the statutes, although the word was altered), "Hæc eadem, regno occupato, supremi ecclesiæ capitis locum in omni Anglia ejusque præcipuam auctoritatem atque jurisdictionem monstruose sibi usurpans regnum ipsum jam tum ad fidem catholicam et bonam frugem reductum rursus in miserum exitum revocavit;" and lastly, that she persecuted and oppressed the profession of the Catholic religion, and compelled them to acknowledge her spiritual supremacy, "Catholicæ fidei cultores oppressit, episcopos et alios sacerdotes, catholicos, suis ecclesiis ejicere deque ecclesia causis decernere ausa, prælatis, clero et populo, ne Romanam ecclesiam agnoscerent, interdixit, plerosque in nefarias leges suas venire, et Romani pontifici auctoritatem atque obedientiam abjurare, seque solum in temporalibus et spiritualibus dominam agnoscere jurejurando exegit, pœnas et supplicia in eos qui dicto non essent audientes imposuit, easdem ab iis qui in unitate fidei et prædicta obedientia perseverarunt exegit, catholicos antistes et ecclesiarum rectores in vincula conjecit, ubi multi diuturno languore et tristitia confecti extremum vitæ diem misere finiverunt." To which the pontiff adds, "Quæ omnia cum apud omnes nationes perspicua et notoria sint," which it would have been absurd to say if the facts were not so, and known not to be so. It is abundantly obvious, at all events, that the pope and the Roman Catholics (whose lives depended upon the question) understood the queen to be assuming and asserting a spiritual supremacy; and though Walsingham represents that the parties executed were offered their lives if they would acknowledge the sovereignty and title of Elizabeth, and promise to defend her against invasion, the authorities cited by Lingard show, on the contrary, that the only condition offered them was an acknowledgment of the spiritual supremacy

¹ 35 Eliz., c. 1.

penalties against persons not attending divine service, is entitled an "Act to retain the Queen's Majesty's Subjects

of the crown. And though he artfully represents the persecutions as having commenced after the bull, and even then not to have been severe until after the rumors of invasion, ten years later, the contrary not only appears from the bull itself, but the facts of contemporary history. Upon the enactment of the 5 Elizabeth, c. i., Archbishop Parker issued instructions to his suffragan bishops as to wilful recusants, and directing the oath to be tendered; and in that he calls them governors of the church under the queen (*Corres. Park. Soc.*, 174). In 1564, six years before the bull, there was a letter from the vice-chancellor of Cambridge to the archbishop, showing how minutely Roman Catholics were sought after at that time. And in the articles drawn for Grindal's first metropolitan visitation, the most vexatious inquisitions were made into the practice of the Roman Catholic religion: "Whether there be any person that resorteth to any popish priest for shrift or confession? and whether there be any that refuse to come to church, etc.? whether there be any persons that keep any English books set forth of late, either against the queen's supremacy in matters ecclesiastical or against the true religion and catholic doctrine, as received and established by common authority within the realm? whether there be any that use to pray on beads, or any superstitious popish primer or other like book?" (*Remains Park. Soc.*, 118). So that the English Catholics could not even pray out of Catholic books, nor defend their doctrine of the sacrament, nor go to confession, nor practise their religion in any way, without being subjected to persecution, and it was by this system of persecution the North was goaded into rebellion. Then came the cruel slaughters by which it was suppressed in 1569, and then the bull in 1570. As the bull was undoubtedly directed against the sovereignty of Elizabeth, penal laws against the publication of it could hardly have been deemed religious persecution, and hence Walsingham sought to make out that it was so; but, on the contrary, only one man, Felton, was executed on that account, and the act was against any papal bulls. And during the subsequent years, large numbers of priests and others were executed for denial of the royal supremacy, that is, the supremacy as described by the archbishop and understood by the pope as a supremacy in matters spiritual. In 1577, Cuthbert Mayne, for instance, was executed under the act of 1571, for bringing in bulls or Agnus Deis and reconciling to Rome, *i. e.*, bulls having nothing to do with the queen's title, and only spiritual in their scope, and having reference to religious matters. So as we find in Stowe, in 1578, Nelson was executed for denying the queen's supremacy and such other traitorous words; and Sherwood was executed for the like treason with that of Nelson, *i. e.*, denying the supremacy. So in 1581, Ilance, a priest, was tried, at the Old Bailey, where he affirmed that he was subject to the pope in ecclesiastical causes, and that the pope had still the same authority in England which he had a hundred years past, with other traitorous speeches, and he also was executed (*Soames' Ep. Hist.*, 257); that is to say, for such speeches as the above, asserting the spiritual supremacy of the pope, for he asserted it only as it had been exercised in England a hundred years ago; and for ages before the Reformation the pope not only had exercised no kind of temporal jurisdiction (if indeed he ever had), but had been greatly limited, even in the exercise of his spiritual jurisdiction. And this was called traitorous. And in 1582, no less than eleven were executed for the same cause; and so in every year of Elizabeth's reign, in some as many as ten or more, in one as many as thirty-six. The details may be found in Stowe and Camden. Hume, under the date 1584, admits fifty priests to have been executed and fifty-three to have been de-

in their due obedience." It seems then the most natural method of illustrating this part of our criminal law to

ported from the realm. And Mr. Soames, in his "Elizabethan Religious History," gives the details of these executions, and avows that they were for religion, because the Catholic religion acknowledged the papal supremacy. This was made treason by the statutes, and hence this writer (who has fully imbibed their spirit) says, "By sheltering men refusing to abjure treason" (*i. e.*, the treason of the papal supremacy in spirituals), "because they now spoke openly of little or nothing but religion," Elizabeth would have exemplified Esop's dolt cherishing a paralyzed viper (*E. R. H.*, 341). So that here we have an author in our own time avowing and approving of the execution of men entirely on account of their religion, because that religion involved a denial of the spiritual supremacy of the crown. And a more illustrious author, a statesman of great distinction in our own time,—Lord Russell,—has not shrunk from vindicating these atrocious laws, and did not hesitate to write, that whether or not they were wise, he had no doubt that they were just (*Const. Hist. Eng.*). The revival and the vindication of these atrocious doctrines gives the subject an interest and importance it would not otherwise have, and it is essential in order to understand the subject, to keep clearly in mind, that these penal laws, in one form or another, were all directed against the assertion of the papal supremacy or the denial of the royal supremacy; that the latter was substituted for and in place of the former, and that as the former was purely spiritual, so the latter was asserted as a spiritual supremacy, that the denial of it was made treason; and that the bringing in of books upholding of or doing any acts in acknowledgment of it, as taking holy orders from Rome, were made capital; and that these were the penal laws in force in this reign, more or less from the beginning, but especially after the 13th Elizabeth, 1572, and from that time to the 23d Elizabeth, 1591, when it is admitted that these cruel laws attained their full severity. It is a fact which is little known, having been studiously concealed by most authors, though the superior candor of Sir James Mackintosh led him to disclose that persons were burnt for heresy under Elizabeth. In the year 1575, towards the latter part of her reign, a number of anabaptists were seized and committed to prison; a commission was issued to the Bishop of London to proceed judicially if the case so required. Some of them recanted and were released, after bearing lighted fagots in their hands. Twelve were committed, of whom ten were condemned to be, and actually were, burnt alive (*Stowe*, 630; *Heylin*, 105; *Mack. Hist. Eng.*, vol. iii.). Many more, no doubt, would have been so executed had it not been for the energetic remonstrances of the Puritans, whose power was then too great to be well safely defied altogether, although it was still too weak to protect them entirely from the persecutions which, when the occasion offered, they inflicted with equal cruelty upon others. The truth is, that in that age men of all religious bodies persecuted when they could: and the government at this time pursued that policy of persecution upon principle. Mr. Jardine, in his criminal trials, has a striking summary of the persecuting laws which in this reign were in force, and were constantly enforced against the Roman Catholic religion. They were directed, moreover, to impose the royal supremacy not merely on ministers of the Church of England, but on all men, and especially upon Roman Catholics, who, on this account, were stigmatized as "Papists." Therefore these were laws of persecution. The author above observes, that the penalties and forfeitures imposed in the act of uniformity were double what they had been before. But the law against the papal supremacy went infinitely further, and it actually, it will be observed, made it high treason to maintain the spiritual supremacy of the pope, *i. e.*,

take together the statutes relating to the royal state, and to religion; and so trace the progress of these alterations in the order in which they happened.

By stat. 1 Elizabeth, c. 1, any persons defending the power or jurisdiction, spiritual or ecclesiastical, of any foreign prince, prelate, person, state, or potentate, within this realm, who do advisedly anything for the maintenance or defence of it, they, their aiders and abettors, shall forfeit all their goods and chattels, real and personal; and if such offender has not goods and chattels to the value of £20, he is to be imprisoned for a year, and all his ecclesiastical preferments are to be utterly void. For the second offence, it is made a præmunire, and the third, high treason. Prosecutions, if for words only, to be within half a year.¹ And stat. 1 and 2 Philip and Mary, c. 8, sec. 40, is confirmed as to all cases thereby made præmunire.² It is moreover ordained that no person shall be indicted or arraigned for any offence under that act, unless there are two sufficient witnesses, or more, to testify and declare the said offences,³ a provision which we more than once find annexed to penal statutes in this reign. These are the penalties inflicted by this famous act, in addition to what we had before noticed concerning the oath of supremacy.

The next is the act of uniformity, which stands also next in the statute book; this comprises the same forfeitures and regulations as were before enacted in the two acts of uniformity⁴ in the reign of Edward VI., respecting the use of the Common Prayer, the speaking in derogation of it, and not resorting to church. The Common

of the head of the Roman Catholic Church. It has often been pretended that these laws were passed for a political purpose, but they were not the less laws against religion. The pretence was, that they were laws in favor of the royal sovereignty, but they were really in support of the royal supremacy; and as has been shown already, in the notes to the previous chapter, that this was very different indeed from the royal sovereignty. The sovereignty was temporal, the supremacy was spiritual. The penal laws were directed against the spiritual supremacy of the pope, which was an essential privilege of the Roman Catholic religion, therefore they were laws against religion; so that a Roman Catholic who ventured to say that the pope was the head of the Church, although the very phrase implied a purely spiritual supremacy, was to be hanged, drawn, and quartered as a traitor.

¹ Sect. 31.

² Sect. 32.

³ Sect. 37.

⁴ 2 and 3 Edw. VI., c. 1; and 5 and 6 Edw. VI., c. 1.

Prayer had undergone some few alterations; therefore it was necessary to re-enact this amended work, with all the protections and security which the former enjoyed. This was done in the very words of the two former acts, with the single alteration of the penalties and forfeitures being increased, sometimes more than double. Parsons and vicars, or ministers not using, or speaking contemptuously of the Common Prayer, are, for the first offence, to lose the profit of all their spiritual promotions for a year, and to be imprisoned for six months; and, for the second offence, for a whole year, and to be *ipso facto* deprived of all their spiritual promotions (a); and the third offence is to have the additional punishment of imprisonment for life. If such offender has no preferment, he is to be imprisoned, for the first offence, one year; for the second, during life. The clause concerning interludes and songs in derision of it inflicts the forfeiture of a hundred marks for the first offence, four hundred for the second; third

(a) Upon this there were even at first some doubts whether the benefice was void for not reading the articles before deprivation (*Dyer*, 18 *Eliz.*, 346; 23 *Eliz.*, 377); but at last it was settled that it was so. It was at the end of the reign of Elizabeth so held. If an incumbent neglected to read the Thirty-nine Articles within two months after his induction, pursuant to this statute, the benefice became thereby void, without sentence of deprivation (*Baker v. Brent and Another*, *Cro. Eliz.*, 679). There, in the 16th Elizabeth, the patron presented one Dunstan, who was admitted, instituted, and inducted, but read not the articles; and afterwards he was deprived, by sentence declaratory, for not reading the articles; whereupon he appealed, and, pending the appeal, Baker was presented by the queen, instituted, and inducted, and then the patron presented another clerk, who sued in the court Christian to be admitted, and, upon prohibition against him, judgment on the facts was given against him on the above ground. And all the judges held that the church became presently void by the not reading of the articles, and there needed not any deprivation, for otherwise the statute should be defrauded at the ordinary's pleasure, if he could not deprive. By 13 and 14 Charles II., c. iv., every ecclesiastical person, within two months after his promotion, must publicly read the morning and evening prayers in the church to which he is promoted, as appointed by the Common-Prayer Book; and, after such reading, shall openly declare his unfeigned assent to the things contained therein, or shall be *ipso facto* deprived. It was held *in quare impedit* that, if an incumbent shall be deprived for not reading of the articles according to the statute, the ordinary should give notice to the patron. This notice should not merely show that the incumbent had not read and subscribed the articles, but that he ought to have subscribed, and had been deprived in default of it. Also, it was not sufficient that the intimation should be read at the church door or in the pulpit, but it should be special and personal notice to the patron (*Bacon's Case*, *Dyer's Reps.*, 18 *Eliz.*, 690). In another case it was held that there was no lapse by deprivation *ipso facto* incurred, but after notice given and six months' lapse of time (*Dyer's Reps.*, 22 *Eliz.*, 96).

offence, all the offender's goods and chattels, and imprisonment during life. Those not resorting to church, in addition to spiritual censures to which they were before subjected, are to forfeit 12d. for every offence (a).

(a) In the time of the Commonwealth a case arose in which it was held at common law an indictable offence to use coarse language reviling the Christian religion. An information was exhibited against a man for uttering of divers blasphemous expressions horrible to hear, viz., that Jesus Christ was a bastard and a whoremaster, that religion was a cheat, and that he neither feared God, the devil, nor man. Upon his trial he attempted to explain the words in another sense than they ordinarily bear. For instance — whoremaster, i. e., that Christ was master of the whore of Babylon, and such kind of evasions for the rest; so that he wanted, in fact, to make it out that he had only reviled the Roman Catholic religion. But the words, as alleged, being proved, he was found guilty; and Hale said that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the courts of law. For to say religion is a cheat is to dissolve all those obligations whereby the civil society is preserved, and that Christianity is part of the law of England, and, therefore, to reproach the Christian religion is to speak in subversion of the law; and therefore they gave judgment upon him in effect that he should be condemned to perpetual imprisonment, viz., to pay a thousand marks fine, and to find sureties for his good behavior during life (*Taylor's Case*, 1 *Vint.*, 293). But this judgment was far from satisfactory for several reasons. It appeared to proceed chiefly upon the ground that the defendant had reviled the Christian religion, a vague phrase, which left the question in great obscurity. The court went upon the words "that religion was a cheat," which they seemed to assume meant all revealed religion, or any form of the Christian religion. But if the words had been merely a denial of the divinity of Christ? or, again, if they had been, as the defendant maintained, only in abuse of the Roman Catholic religion? The court laid it down that Christianity was parcel of the law of England — a proposition for which they cited no authority, and could not possibly have cited any for so extremely vague a proposition, though there would be ample authority to show that, to blaspheme the Roman Catholic religion, which was the established religion for centuries, was an offence by the common law. This, however, might be upon the ground that it was the established religion, and if so, then it would apply by analogy to the Protestant religion when so established. In the time of the Commonwealth, however, there would be a necessity, as there is now, for a wider definition of blasphemy, which, it is to be observed, is a very different thing from heresy, or the mere maintenance of heresy, which may be by means of fair reasoning, and appeal to authority and force of argument, couched in language candid, charitable, and respectful; whereas the essence of blasphemy appears to be an outrage upon the feelings of other men by coarse offensive language. In a word, it is abusing and reviling other men's religion, as distinct from merely arguing against it. Perhaps the best definition of the offence in a legal sense and for practical purposes, may be found in this view; and such appears to have been the tenor of the indictment, which put the stress of the offence on the uttering of blasphemous expressions, and the particular expressions were set out which had that character of coarse ribaldry which are always associated with the idea of blasphemy. In this view it should seem that any abusive expressions uttered against any form of the Christian religion recognized and protected by law (whether established or not), is an indictable offence,

So far of these two acts, which are confined entirely to religion.

These are followed in the same sessions by stat. 1 Elizabeth, c. 5, which enacts, that any person who shall compass or imagine to deprive the queen or the heirs of her body from the style or kingly name, or levy war or depose them, and shall utter the same by open words, or publish that the queen is not, or ought not to be, queen, such offender is to forfeit all his goods and chattels, and the profits of his lands during life; and if the same is done by writing, printing, overt deed or act, it is made high treason. The next statute¹ extended the penalties of stat. 1 and 2 Philip and Mary, c. 3, against speaking of slanderous words against the king or queen, to Queen Elizabeth, and the heirs of her body. Both these acts, from the terms of them, expired with the queen's life. By c. 18 of this act was revived, during the queen's life, stat. 1 Mary, st. 2, c. 12, against unlawful and rebellious assemblies.

The next statute is 5 Elizabeth, c. 1, which complains of the "dangers by the fantors of the usurped power of the see of Rome, grown to marvellous outrage and licentious boldness, and *now requiring more sharp restraint and correction of laws* than hitherto in the time of the queen's majesty's most mild and merciful reign have been established." Therefore, any person by writing, ciphering, printing, preaching, or teaching, deed or act, defending the authority of the see of Rome within this realm, was by this act subjected to a præmunire.² The oath of supremacy ordained by stat. 1 Elizabeth, c. 1, was to be taken for the future by all persons in ecclesiastical orders; those admitted to any degree of learning in any university; all schoolmasters and public and private teachers of children; those admitted to degrees in the common law, as utter barristers, benchers, readers, ancients in the inns of court; principal treasurers, and such as be of the grand company of every inn of chancery; attorneys, prothonotaries, and philizers; sheriffs, escheators, fœdaries; those admitted to any ministry or office in the common law; and all other officers or ministers of any court.³ And all persons

provided they are so coarse and offensive and shocking to the feelings that any fair, impartial jury would say they amounted to blasphemy, and tended to bring that form of Christianity unfairly into odium and contempt.

¹ Cap. 6.

² Sect. 2.

³ Ibid., 5.

refusing the oath, upon its being tendered, were subjected to the penalty of a *præmunire* (a). In case of a second offence, in defending, as before mentioned, the papal power, or refusing the oath on a second tender, three months after the first, it was made high treason.¹ But no one was to be compelled, under this penalty, to take the oath on a second tender, unless in the following cases: If he was an ecclesiastic who had, in one of the three preceding reigns, an office or charge in the church, or should have any in the queen's reign; if he had an office or ministry in the ecclesiastical court, or refused to observe the book of Common Prayer, after admonition by the ordinary or his officer, or depraved the church service, or should say or hear private mass.

It is directed that knights, citizens, and burgesses should take the oath before the lord steward, before they entered into the parliament-house; but the queen was so assured of the faith and royalty of the temporal lords, that no barons were to be compelled to take the oath.² It is declared that it should not be lawful to kill a person attainted in a *præmunire*, notwithstanding any exposition of law to the contrary, which probably alluded to the opinion given in parliament to the contrary in the reign of Henry VIII.

In the next parliament two more acts were made, one for the protection of the queen's person, the other
of treason. to prevent the influence of the see of Rome
The stat. 13 Elizabeth, c. 1, says that it was doubted whether the laws and statutes then in force were sufficient for the surety and preservation of the queen. It was, therefore, thought proper, to enact the penalty of treason in a way which would more effectually reach offenders in the first outset of traitorous attempts than the statute of Edward III. could, as that always required *an overt act* to demonstrate the intention of the mind. This statute

(a) In the 7th year of Elizabeth, Bonner, by the addition of "doctor" and "in holy orders," was certified by the Bishop of Winchester as a recusant of the oath of supremacy, under 1 Elizabeth, and the certificate was challenged because the addition (*i. e.*, description) was not "clericus" or "episcopus;" but the objection was disallowed. The indictment was under 5 Elizabeth, and the defendant pleaded not guilty, but the trial was in Surrey, where the oath was tendered. The result does not appear upon the report (*Dyer's Reps.*, 58; 7 *Eliz.*).

¹ Sect. 10, 11.

² *Ibid.*, 16, 17.

therefore enacts, that if any person compass, imagine, invent, devise, or intend the death of the queen, or any bodily harm tending to death, destruction, maim, or wounding; or to deprive or depose her from her style, honor, or kingly name, or to levy war, or to move any foreigner with force to invade the realm; and such compasses, imaginations, inventions, devices, and intentions, should advisedly and expressly utter or declare by printing, writing, ciphering, *speech, words, or sayings*; or if any declared and affirmed, by express words, that the queen was not, or ought not to be, queen, or that any other person ought to be, or should advisedly, by writing, printing, or express words, affirm that the queen was heretic, schismatic, tyrant, infidel, usurper, all such offences should be high treason. As also, if any one maintained or affirmed any right or title in succession or inheritance to the crown, or that the queen, with authority of parliament, was not able to limit the crown, or that the present statute was not good and valid.

And to avoid contentions and seditious spreading abroad of titles to the succession, it was enacted, if any one by book or work, printed or written, directly affirmed that any one particular person was or ought to be heir to the queen, except the issue of her body; or should spread any books or scrolls to that effect (a); or should print, bind, put to sale, or utter any such book or writing; such offender should be imprisoned for a year, and forfeit half his goods, and for the second offence incur a præmunire. So jealous was this princess concerning the discussion or mention of this point of succession, that she did not scruple to revive those severe laws of her father which had been so wisely repealed, though in part re-enacted in the last

(a) A few years after the passing of this statute, it was resolved by all the justices upon it: 1. That if a man imported books, written beyond the seas, against the supremacy, knowing the effect of them, and then utter (or publish) them to any subjects, he was within the danger of the act. 2. That the receivers, if in conference they did not allow them, were not so. 3. But that if in conference they allowed (*i. e.*, assented) to the books, then they were within the statute. 4. So of those who hearing the contents should affirm them to be good. 5. So of those who conveyed the books secretly to their friends to persuade them to be of that opinion. 6. So of those who should print and publish such books within the realm. 7. So if such books were written within the realm, and conveyed out of the realm, and were there read, and conference had upon them (*Dyer*, 77).

reigns, till now they seemed to be put in all their original force.¹

The former act seems to be made in support of stat. 1 Elizabeth, c. 5. This, which follows, is made in aid of stat. 5 Elizabeth, c. 1, and was intended to prevent the bringing in, and execution of, bulls and other instruments from the see of Rome. These were observed to have been imported in great abundance, and that many ignorant people had been reconciled to the Romish church (*a*). It was, therefore, enacted, that any person who shall put in use such bull, writing, or instrument of absolution or reconciliation; or who shall take upon him by color of such to absolve or reconcile any one; or who shall receive willingly such absolution or reconciliation; or who *shall have* obtained, since the last day of the parliament holden in the first year of this reign, any bull of any kind; or shall put it in use; shall be adjudged guilty of high treason; and those who are aiders and maintainers after the fact are to incur a præmunire. Thus far of those who use or receive; but the act goes further, and makes those guilty of misprision of treason who do not disclose, within six weeks, whenever such bull shall have been offered to him.²

Another species of offenders are considered in the next clause; for those who bring into the realm any token or things called *Agnus Dei*; or any crosses, pictures, beads, or the like superstitious things, from the see of Rome; or from any persons who claim authority from that bishop, to hallow and consecrate such things, and deliver them to any to be worn; both those who give and those who receive are subjected to a præmunire. There are provisions in favor of those who deliver up to some magistrate such tokens or bulls to be destroyed, within a certain limited time; and a pardon for those who, having been reconciled to the Bishop of Rome, confess it, and submit themselves.

These two acts were made when the jealousy of the

(*a*) In other words, were converted to the Roman Catholic religion. This, therefore, was a law rendering it high treason to embrace that religion; in other words, it was a law that whoever should embrace that religion should be hanged, with all the horrible barbarities which in those days accompanied an execution for treason.

¹ Stat. 26 Hen. VIII., c. 13; 1 Edw. VI., c. 12; 1 and 2 Philip and Mary, c. 10; 1 Eliz., c. 5.

² Sect. 5.

Queen of Scots and her Catholic adherents began to be serious, and called for every defence which the law could provide for the queen's person and government. The next chapter of this act no doubt had the same object in view, and was meant to co-operate towards keeping the subject in due obedience, untinctured by foreign influence and notions. It enacted,¹ that any one born within the realm, or free denizen, who departed the realm without the queen's license, and did not return within six months after proclamation, should forfeit all his goods and chattels, and profits of all his lands during life: the same of those who did not return within six months after the expiration of their license. This act expired soon.

The alarming state of public affairs produced in the next year an act of a severe kind, conceived upon the idea of stat. 13 Elizabeth, c. 1. This was stat. 14 Elizabeth, c. 1, which enacted, that any one who should unlawfully, and of his own authority, compass, imagine, conspire, practise, or devise, rebelliously to take or keep any of the queen's castles, towns, fortresses, or holds; or to rase, burn, or destroy any castle, fort, or bulwarks, having munition or ordnance of the queen's therein; and should declare it by *express words, speech, act, deed, or writing*; should be adjudged a felon, without benefit of clergy. So far of *conspiring* to do the above acts. It was further enacted, that if any kept or detained from the queen any of her castles, towers, fortresses, or holds; or any of her ships, ordnance, artillery, or other munition or fortifications of war; and did not render them in six days, after demand by proclamation; or should burn or destroy any of the queen's ships, or cause any haven to be barred, it should be high treason.

And to secure the execution of this act, because the law had provided no sufficient punishment in cases of rescue, or escape of prisoner, unless the escape or rescue was really effected, it was enacted by the next chapter of this same statute, that it should be misprision of treason to imagine, conspire, devise, invent, or go about unlawfully, to set at large any person committed for treason, or suspicion thereof, before indictment, and for to declare such conspiring, by express words, writing, or other matter. If

¹ 13 Eliz., c. 3.

after indictment, it was to be felony; if after attainder, high treason.

There are no statutes relating to the queen's person till stat. 23 Elizabeth, c. 1 and 2, when, as usual, there was one made concerning religion to accompany it.

The stat. 23 Elizabeth, c. 1, was made in aid of stat. 13 Elizabeth, c. 2, concerning bulls; and it is intended to draw closer the restrictions on nonconformists. It enacts, that persons who put in practice any pretended authority to withdraw others from their natural obedience to the queen; or who, for that intent, withdraw them from the established religion; or who move them to promise any obedience to the see of Rome; and also the persons so withdrawn, or who shall so *promise*, are to be adjudged guilty of high treason. Every person saying mass is to forfeit two hundred marks, and be imprisoned a year; and those who hear mass, are to suffer the same imprisonment, and forfeit one hundred marks (*a*). All persons above sixteen years, who do not come to church according to the statute of uniformity,¹ are to forfeit £20 every month of such absence. After a person has so done for twelve months, there is to be a certificate thereof transmitted by the bishop, or justice of peace, to the king's bench, and then he is to be bound with two sureties in £200 at least to his good behavior, and so to continue till he comes to church.² Again, if any person or body corporate employ a schoolmaster who does not come to church, or is not allowed by the bishop, they are to forfeit £10 per month. However, such persons are excepted out of the penalties of this act who are usually present on Sunday at divine service as established by law in his house, and does not obstinately refuse to go to church; provided that

(*a*) Upon this statute a gentleman having been indicted and convicted for hearing three private masses on three several days by three several indictments, the question was raised, whether he should pay a forfeit to the queen, three hundred marks by the above statute, or only one hundred marks for the first offence? And it was held, that it should be only one hundred marks, their reason being that for the second the party was to forfeit four hundred marks, and for the third all his goods and perpetual imprisonment. Also one Fermor was convicted for the hearing of two masses, upon several indictments, and one hundred marks only were assessed by the justices, for which they were blamed by some in authority, who supposed that the statute gave one hundred marks for each offence, whereas it was more; and the penalties were advanced on each occasion (*Dyer*, 323).

¹ 1 Eliz., c. 2.

² Sect. 4.

they go to church four times a year at least, which by this act is required of everybody whatsoever.

So much for this severe law, which is followed by one¹ against seditious rumors uttered against the queen. It repealed two former statutes of the like kind, namely, stat. 1 and 2 Philip and Mary, c. 9, and 1 Elizabeth, c. 6, and enacted that a person who spoke of *his own imagination* any false, scandalous, and seditious news, rumors, sayings, or tales against the queen, should be put in the pillory and have both his ears cut off, unless he choose to pay £200, and suffer six months' imprisonment; and if he spoke such news of *the report of another*, he was to lose one of his ears, unless he would pay the same fine, and suffer imprisonment for three months. A second offence was felony, without benefit of clergy. If any one should devise, and write, print, or set forth any book, rhyme, ballad, letter, or writing, containing scandal and sedition against the queen; or to encourage or stir up any insurrection or rebellion, or should cause such to be printed, written, or published, it was made felony without clergy. And to prevent idle and malicious conjectures about the queen's life, it was further enacted, that all persons, who, by erecting any figure, casting of nativities, or by calculation, prophesying, witchcraft, conjurations, or other unlawful means, should seek to know, and should set forth by express words or deeds how long the queen was to live, or who should reign after her; or should utter any direct prophesies to such intent; or should by words, writing, or printing, wish, will, or desire the death of the queen, should be guilty of felony without clergy.

The parliament, which met in the 27th year of the queen, passed two acts, dictated by the exigency of affairs: one to confirm the association entered into for the protection of the queen's person; another for suppressing Jesuits and seminary priests. The situation of the Queen of Scots had become more critical; hostilities had commenced with Spain; and the zeal of the Catholics was proportionably quickened by the great objects in contemplation. The legislature kept pace with the discontented party, and now devised the two statutes above mentioned, directed against the enemies of the established religion and the state. By

¹ Stat. 23 Eliz., c. 2.

the former of these,¹ it was enacted, that in case of any invasion or open rebellion, or any act against the queen's person, by or in behalf of one who pretended a title to the throne after the queen's death, or anything should be compassed or imagined to that intent; the queen might grant a commission to certain lords, privy counsellors, and judges, to the number of twenty persons, to examine offences of that kind, and to give judgment, as, upon proof, they should think fit: and such judgment being published by proclamations, should exclude from the throne such against whom it was pronounced. And all the queen's subjects might lawfully, by all forcible and possible means, *pursue to death* such person by whose means or privy such invasion or rebellion should be denounced in the above form to have been attempted, done, or imagined. And such person by whom any such act against the queen's life should be executed, should be excluded from any claim to the crown, and be pursued by all the queen's subjects to death as before mentioned. This is the substance of this famous act, of which the Queen of Scots was evidently the object. This is the last statute which was passed in this reign to contrive any extraordinary means of protection for the queen's life, or to inflict any new penalty on such offenders. They were all made to continue only during the queen's life, and of course expired with it. The remaining statutes on this head are confined entirely to religion.

The stat. 27 Elizabeth, c. 2, was directed against some new objects of jealousy, the Jesuits and seminary priests. The English priests, who had fled to the Netherlands, assembled themselves at Douay in 1568, and there had formed themselves into a college; afterwards, when they were banished thence, another seminary was erected at Rheims, and another at Rome; which, as time consumed the popish priests in England, might still supply new ones, to sow the seeds of the Romish religion here. For this reason they were called *seminaries*, and those bred up there were commonly called *seminary priests*. Out of these colleges were sent forth, into England and Ireland, many young men, hastily put into holy orders, and full of the principles there taught; fully persuaded of the

¹ Stat. 27 Eliz., c. 1.

divine right of the pope over causes, as well temporal as spiritual ; bearing a virulent hatred against the queen, and hope of restoring the Catholic religion by means of Mary Queen of Scots. These persons pretended only to administer the sacraments of that religion, and to preach to papists ; but it was soon found that they were sent underhand to seduce the queen's subjects from their allegiance, and to prevail on them to be reconciled to the Church of Rome. To these seminaries were sent out of the kingdom great numbers of young men of all sorts, who were admitted into the college upon making a vow to return again to England. The Jesuits also, about the year 1580, began to come into England. These two descriptions of papists were the most dangerous, and were daily creeping over into this country. Several proclamations, according to the practice of these times, were made against entertaining these persons, and sending over children to be educated in these seminaries.¹

At length the legislature came to a resolution to pass a standing law against such suspicious persons. It is accordingly enacted by stat. 27 Elizabeth, c. 2, that all Jesuits, seminary priests, and other priests whatsoever, ordained by any authority from the see of Rome, should, within forty days after the end of the parliament, depart the realm. And it shall not be lawful for any Jesuit, seminary priest, or other priest, deacon, or religious or ecclesiastical person whatsoever, being born within the realm, and ordained as above mentioned, to come into or remain within the realm, after those forty days, under pain of high treason. And the knowingly receiving, relieving, or maintaining any such person is made felony without clergy. So far of persons in orders. It is enacted, if any of the queen's subjects, not being of the above description, brought up in any college of Jesuits or seminary beyond the seas, shall not, within six months after the proclamation, return, and within two days after, submit himself to the law ; then he shall, upon his return, in any other way, without submission, be adjudged a traitor. Those who shall send over sea any relief or maintenance to any of the above-mentioned persons, or to any college or seminary, are to incur a præmunire.² And to prevent the increase of novitiates in those places,

¹ Cambd., 244-246.

² Sect. 6.

it is enacted generally, that none shall send their children, or others, being under their government, to any parts beyond seas; without special license of her majesty and four of her privy council (except those whom merchants send abroad on affairs of trade, and mariners), under pain of forfeiting £100.¹ To promote the discovery of these offenders, any person knowing a Jesuit, seminary or other priest, to be within the realm, and not disclosing it to some justice, or other head officer within twelve days, shall be fined and imprisoned at the queen's pleasure; and such justice not giving information to some privy councillor within twenty-eight days, shall forfeit two hundred marks.

Any of these persons might, within the forty days, or within three days after his return into the realm, submit himself to some archbishop, bishop, or justice of the peace, and truly and sincerely take the oath of supremacy, ordained by stat. 1 Elizabeth, c. 1, and by writing under his hand confess and acknowledge, and from thenceforth continue, his due obedience to the laws, statutes, and ordinances made, or to be made, in causes of religion, and should thereupon be discharged of the penalties of this act.² However, if such person, within ten years after submission, come within ten miles of the queen's residence, without the queen's license in writing, he was to lose all benefit of his submission.

There was a statute made in 29 Elizabeth³ to enlarge and enforce the payment of the penalties ordained by stat. 23 Elizabeth, c. 1. It provides that every person, once convicted under that act for not going to church, shall, at the Easter or Michaelmas, whichever follows next after his conviction, pay into the exchequer £20 for every month contained in the indictment; and also, for every month after such conviction, without any fresh indictment, in like manner, £20 per month, as much as shall remain unpaid. And if default is made in any payment, all his goods and two parts of his lands may be seized and enjoyed by process out of the exchequer, leaving a third part for maintenance of the offender and his family.

The last two statutes made in this reign, against these offenders in matters of religion, were in the 35th year of the queen. The first of these was designed "to prevent

¹ Sect. 7.² Ibid., 10.³ Cap. 6.

the inconveniences which might follow from the dangerous practices of *sedition sectaries* and disloyal persons." This was levelled at the Puritans, and Sectaries. other Nonconformists of that description. The makers of stat. 23 Elizabeth had probably an eye to the new set of religious malcontents, as that act provides penalties against such as refuse to attend the service of the church (the great criterion to discover people of these sentiments), and bears the same title with this: "An Act to retain the Queen's Majesty's Subjects in their due obedience." The republican notions of these people rendered them less patient of lawful authority, it was then thought, than the Papists naturally were, and were therefore considered, more properly than them, under the description of disobedient and disloyal. The other of these two acts was against popish recusants.

To begin with stat. 35 Elizabeth, c. 1. It is thereby enacted, that if any person, above the age of sixteen years, who has obstinately refused to repair to church, and forborne so to do for one month, shall, after forty days, after that sessions of parliament, by printing, writing, or express words or speeches, practise to persuade any of the queen's subjects to deny her power and authority in cases ecclesiastical; or to that end, shall persuade any one from going to church; or to be present at any unlawful assemblies, conventicles, or meetings, or shall himself join in such assemblies; such person shall be committed to prison until he conform, and make open submission and declaration of such conformity. And if he does not so comply within three months, being required by the ordinary or a justice of the peace, he shall, being warned and required so to do by a justice of peace, upon his oath, in sessions, abjure the realm, and depart; which abjuration is to be entered of record. And if he refuse to abjure, or after such abjuration he neglect to depart, or shall return without the queen's license, it shall be felony without clergy.

However, if a person who has incurred the penalty of this act, shall, before he is warned and required by some justice to make abjuration, go to some church on Sunday, and there make open and public submission to the law, he is to be discharged of the penalty. A form of which submission is set forth in the act. This submission to be entered in a book in the parish, and to be certified to the

bishop. Any person who entertains, receives, or maintains offenders under this act, after notice given to him by the ordinary, justice of assize or of the peace, the minister, curate, or churchwarden, shall forfeit £10 per month during the time he so does; but this is not to extend to persons who relieve a wife, father, mother, child, ward, brother, sister, wife's father or mother, *not having any certain habitation of their own*; or the husbands or wives of any of them (a).¹ Persons abjuring are to forfeit all their goods and chattels, and lose all their lands during life.² It is provided that no popish recusant (who were reserved for another kind of proceeding, as we shall see) nor feme-covert should be bound to abjure by virtue of that act.³ These were the compliances expected from the sectaries, and such were the penalties on those who refused to conform, in which there is nothing sanguinary; but in case of disobedience to the oath of abjuration, however, the severe sanctions under which they were required to join in the national worship, and to abstain from their own, were sufficiently grievous.

It was also now thought better to order and regulate The five-mile act. *popish recusants*, than to increase the number of sanguinary laws already made. The stat. 35 Elizabeth, c. 2, was made with that view, and contained some directions similar to those enacted in the last statute regarding the sectaries. Though the Puritans, from their liberal notions respecting religion and government, had drawn upon themselves the imputation of disloyalty and sedition, they had never experienced the free language applied to the Roman Catholics. This act speaks "of traitorous and dangerous conspiracies and attempts, daily devised by sundry wicked and seditious persons, who, terming themselves Catholics, *and being indeed spies and intelligencers*, not only for her majesty's foreign enemies, but also for rebellious and traitorous subjects born within her dominions, and hiding their most detestable and devilish purpose under a false pretext of religion and conscience,

(a) The statute 2 James I., c. vi., appointed that if a *feme-covert* be convicted, she shall be committed to prison; and if the husband redeem her out of prison, he shall pay £10 a month; and it was attempted to set this upon the above case, but it was overruled, for it was said that the later statute did not alter any of the former (*Ibid.*).

¹ Sect. 9.

² *Ibid.*, 12.

³ *Ibid.*, 13.

do secretly wander and shift from place to place, to corrupt and seduce her majesty's subjects, and to stir them to sedition and rebellion." This is the character given of the persons who are the objects of this act. They, therefore, applied to them a policy which had been before attempted with regard to Jesuits and seminary priests who had submitted, of confining them for a certain time to a particular distance from the court: this was now applied, in another shape, to all *popish recusants*¹ (a). It is enacted, that every person above sixteen years of age, being born within the realm, or made denizen, and having any certain place of dwelling, who, being then a popish recusant, shall be convicted for not repairing to church, shall, within forty days after such conviction, repair to the place of his usual dwelling or abode, and shall not remove above five miles from thence, upon pain of forfeiting all his goods and chattels and his lands during life. And those who have no certain place of dwelling are to repair to the place where they were born, or where their father or mother then dwell, and there stay, under the above penalty.² And all such persons, within twenty days after their coming to any of the said places, are to notify their arrival, and present themselves, with their names in writing, to the minister or curate, and to the constable or headbor-

(a) In the next reign, a statute, 3 James I., c. iv., passed against recusant papists; and upon this Sir Edward Lenthal was convicted; and after his conviction, and for two years afterwards, *seipsum conformavit*, and came to church, and there continued during the time of divine service; but for three years had not received the sacrament of the Lord's Supper; wherefore the sum of £60 was demanded against him for each year, amounting to £180; whereupon he was convicted (*Syvedale v. Sir Edward Lenthal*, *Cro. Jac.*, 363). Upon this, in the reign of James I., there was an information against Sir John Webb and his lady on the statute, for that the wife, being of the age of sixteen years, did not repair to any church or chapel to hear divine service at any time within eleven months past, wherefore he demanded £220. To which they pleaded a conviction under the 29 Elizabeth, c. vi., and also set up the 35 Elizabeth, c. i., fol. 10, to show that the information was not maintainable. The matter was left in doubt (*The King v. Webb*, *Cro. Jac.*, 480). There was a similar prosecution by the same informer against Sir John Curson and Dame Magdalen, his wife, in which it was proved that she was sick for a great part of the time, and thereby excused heresy. But as it was alleged that she was a recusant, both before and after, it was said by the court that it should not excuse her, for it shall be intended that she obstinately forbore during that time (*Parker v. Sir John Curson and Dame Magdalen*, *Cro. Eliz.*, 529).

¹ These are the first acts in which *popish recusants* are mentioned under that appellation, namely, 35 Eliz., c. 1, 2.

² Sect. 4.

ough of the town; the minister or curate to make an entry thereof in a book, and to certify it to the justices in sessions, who are to cause it to be entered in the rolls.

But because some were not of ability to answer any competent penalty, the act further provides another course to be taken with them; for all persons of that kind (not being *femes-covert*, not having lands or hereditaments of £20 per annum, nor goods and chattels to the value of £40), being popish recusants, and offending as above, and neglecting to comply with the directions of this act, who shall not within three months after being apprehended, conform to the laws in coming to church, and making open submission, when required by the bishop or a justice of peace, shall abjure the realm in the like manner, and with the like penalty for disobedience, after such abjuration, as is mentioned in the last act. Persons by this statute confined to the space of five miles round their usual dwelling-place, may exceed those limits upon having a license to travel, under the hands of two justices, with the assent of the bishop, lieutenant, or deputy-lieutenant of the county. And persons bound to appear to process out of any court *bonâ fide*, shall not incur any penalty.

Any person, before he is convicted of any offence against this act, who shall in the parish church, on Sunday or other festival day, hear divine service, and then, before the sermon or reading the gospels, make public and open submission (a form of which is given in the act) and declaration of his conformity, shall, in like manner, as offenders under the last statute, be discharged of the penalties of this act, unless he afterwards relapses.¹ This submission to be entered in a book by the minister, and certified within ten days to the bishop.² Any person suspected to be a Jesuit, seminary or massing priest, who shall refuse to answer whether he is so, when examined by a person having lawful authority, shall be committed to prison without bail or mainprise till he does.³

With this concludes this head of statutes relating to religion and the government. The object of these laws, as well as the design and scope of them, required that they should be treated somewhat minutely. While they show the great effect which was at that time attributed to the

¹ Sect. 15-18.

² *Ibid.*, 17.

³ *Ibid.*, 11.

powers of legal provision, they display, in a remarkable manner, the extent to which our criminal law was then strained; and, on all accounts, they deserve a particular regard in the history of our jurisprudence.

The remaining penal statutes concern common offences, of which those first deserve notice which make any alteration in crimes that before existed at common law, such as taking away clergy. We shall, after them, consider those which respect the coin, and then such as relate to common felonies and misdemeanors.

Of the former kind, the first which presents itself is stat. 8 Elizabeth, c. 4, made against the *cut-purses* and *pick-purses* of that time (a). The preamble of this act, as it fully describes the persons against whom the law was levelled, and that in a very particular manner, is worthy of notice. It speaks of them as “a certain kind of evil-disposed persons, commonly called cut-purses, or pick-purses, but, indeed, by the laws of this land, very felons and thieves,” who “do confeder together among themselves, as it were, a brotherhood or fraternity of an art or mystery, to live idly by the secret spoil of the good and true subjects of this realm; and, as well at sermons and preachings of the word of God, and in places and time of doing divine service and common prayer in churches, chapels, closets, and oratories; and not only there, but also in the prince’s palace, house, yea, and presence; and at the places and courts of justice, and at the time of ministration of the laws in the same; and in fairs, markets, and other assemblies of the people; yea, and at the time of the doing execution of such as have been attainted of any murder, felony, or other criminal cause, ordained chiefly for terror and example of evil-doers, do, without respect or regard of any time, place, or person, or of any fear of God or the law, under the cloak of honesty by their outward appearance, countenance, and behavior, subtilly, privily, craftily, and feloniously, take the goods of divers good and honest subjects from their

Common offences.

Cut-purses and pick-purses deprived of clergy.

(a) Repealed by 48 George III., c. cxxix. The stat. 48 George III., c. cxxix., s. 2, which repealed the 8 Elizabeth, c. iv., was not intended to alter the offence of robbery at common law, but merely to make stealing from the person not a capital offence (*Rez v. Pearce*, 2 Leach, C. C., 1046). By the stat. 7 and 8 George IV., c. xxvii., the stat. 48 George III., c. cxxix., is wholly repealed.

persons, by cutting and picking their purses, *and other felonious sleights and devices*, to the utter undoing and impoverishing of many." After this, it is enacted, that no person who shall be indicted or appealed for felonious taking of any money, goods, or chattels, from the person of any other *privily without his knowledge*, in any place whatsoever, and shall be convicted by verdict or confession, or will not answer directly, or shall stand wilfully mute, or challenge peremptorily above twenty, or be outlawed, shall be admitted to his clergy.

An exact attention to the wording of this act has induced many to think, that the construction of it is overstrained when applied, in general, to modern pickpockets. It is observed, that, according to the fashion of dress in those days, the purse used to hang at the girdle, and that the persons described in the preamble were such, who, under the appearance of gentlemen, could introduce themselves into all companies and places; that the cutting or picking of purses of that kind was a very different act from the business of picking pockets. To this, perhaps, it might be added, consistently enough with the strictness sometimes observed in construing laws so very penal as this, that when the fashion of dress was altered, there no longer remained the subject intended by this act, and that no offence could be committed under it. But this, perhaps, is allowing too great influence to the preamble of a statute, which it is well known though generally explanatory of the occasion of an act, is not always to control the wording of the enacting clause; and in this instance the enacting part is so general, as well to warrant the practice which has been founded on it for many years.

This statute makes another very material provision respecting clergy. It sometimes happened that a man who had before committed some felony, from which clergy was taken away, would afterwards be arraigned for some single felony upon which he would be allowed his clergy, and after that he could not, by law, be impeached for the former offence. To remedy this, it is enacted¹ that every person who shall be admitted to his clergy, and be delivered to the ordinary and make his due purgation, and shall before such admission have committed any other

¹ Sect. 4.

offence whereupon clergy is not allowable, may be indicted and used in all things according to the law, as though no such admission to clergy had been.

The next statute relating to clergy is stat. 18 Elizabeth, c. 7, which ordains, that if any person commit any manner of felonious *rape*, ravishment, or *burglary* (a), and shall be found guilty, outlawed, or confess, he shall suffer death, and forfeit as in cases of felony, without any allowance of the benefit of clergy. And for plain declaration of the law upon this point, it is also enacted¹ that if any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, it shall be felony without allowance of clergy.

In order to avoid perjuries and other abuses in the purgation of clerks-convict delivered to the ordinary, it is by the same statute enacted, that Purgation of clerks abolished. persons admitted to their clergy shall not be delivered to the ordinary, as had been accustomed, but after clergy allowed, and burning in the hand, according to stat. 4 Henry VII., c. 13, shall forthwith be enlarged out of prison. However, the justice may, for the further correction of such persons, keep them in prison for such time as they, in their discretions, shall think convenient, so as it does not exceed one year. By which provision the benefit of clergy, after many and various qualifications and changes, was at length reduced to its present appearance; for the subsequent clause of this act is only a more full declaration of what had been provided by stat. 8 Elizabeth, c. 4, s. 4. That act had enacted, that persons admitted to their clergy should, notwithstanding, answer to indictments for former felonies not clergyable, if they had made their purgation; but now, as stat. 18 Elizabeth had taken away the necessity of making purgation, on that account, as well, perhaps, as to extend the provision of stat. 8 Elizabeth to *all* former felonies, it is now by the present act further enacted, that all persons who are admitted to the benefit of clergy shall, notwithstanding, be put to answer to *all other felonies*, and suffer execution for the same, as though they had been delivered to the ordinary and made their purgation.

(a) *Vide* 12 Anne, stat. 1. Both statutes were repealed by 7 and 8 George IV., c. xxix.

¹ Sect. 4.

There are two other acts which take away clergy from felons, made in the latter part of this reign. Stat. 39 Elizabeth, c. 9, takes away clergy from the principals, and accessaries before, under stat. 3 Henry VII., c. 2, of stealing heiresses, if they are convicted, or attainted, stand mute, make no direct answer, or challenge peremptorily above twenty jurors. And by c. 15th of the same act, clergy is taken from a certain species of *housebreakers*. To understand the design of this act, we must consider the preamble, which has, in this case, been allowed to govern, in some degree, the enacting clause, though that of stat. 8 Elizabeth, as we before observed, has been disregarded. It recites that "divers lewd and felonious persons, of late years, understanding that the penalty of the robbing of houses in the daytime (no person being in the house at the time of the robbery) is not as penal as to commit a robbery in any house, any person being therein at the time of the robbery, which has emboldened divers lewd persons to watch their opportunity and time to commit many heinous robberies, *in breaking and entering* divers honest persons' houses, and especially of the poorer sort of people, who, by reason of their poverty, are not able to keep any servant, or otherwise to leave anybody to look to their house when they go abroad to hear divine service, or from home to follow their labor to get their living, which is to the hindrance and loss of good subjects, and the utter impoverishing of many poor widows, sole women, and other people." After thus setting forth the occasion of the act, it is ordained, that if any person shall be convicted by verdict, confession, or otherwise, according to law, for *the felonious taking away*, in the daytime, of any money, goods, or chattel, being of the value of five shillings or upwards, in any dwelling-house or houses, or any part thereof, or any outhouse or outhouses belonging to and used with any dwelling-house, although no person shall be in the said house or outhouse at the time of such felony committed, then such persons shall not be admitted to their clergy. Upon this act it has been held, that, notwithstanding the enacting clause speaks only of a felonious taking, and, in fact, takes away clergy from a simple larceny; yet, as the preamble mentions *breaking and entering*, and *robbing, no person being therein*, this has been considered as an interpretation of

Housebreakers de-
prived of clergy.

the meaning of the legislature, and these circumstances are considered as necessary to be laid and proved to constitute an offence under this statute.

The former acts, which had taken away clergy from certain larcenies, had been framed with an eye to certain circumstances attending this crime, as *putting in fear in a dwelling-house, privily*, and the like. This is the first which took into the account of criminality the value of the thing stolen. Now, therefore, as the case of stealing under the value of 12d., was not within any of the former acts, if the thing taken was valued at less than 5s., the offender was out of the penalty of this law. As this valuation is left to the discretion of the jury, who estimate it, with all equitable allowances for the changes which happen in the value of money at different periods, no great inconveniences, if any, arise from fixing such a stated price upon a man's life; and the legislature have accordingly adopted this mode, among others, of marking the degrees of this offence in several subsequent statutes.

After the discordant opinions that have been mentioned in different parts of this history on the subject of principal and accessory, it will be a satisfaction to find that former precedents have been reviewed, and after some attempts made to reconcile them, to see the law on this important article settled on authority. This seems to have been done at least by the latter end of this reign. In *Syer's* case, we find it resolved by the whole court, that if the principal is pardoned, or has his clergy, the accessory cannot be arraigned, according to the old maxim, *ubi factum nullum, ibi fortia nulla*; and none can be called principal till he is so proved and adjudged by law, and that ought to be by *judgment* on verdict, confession, or outlawry: and, therefore, when the principal is pardoned, or takes his clergy *before* judgment, the accessory shall never be arraigned, because there is no judgment against the principal; but if the principal is pardoned, or has his clergy after judgment, the accessory shall be arraigned.¹ In *Bibithe's* case, about six years after, it was held there could be no accessory before to manslaughter, or rather, according to Lambard, chance-medley, because it must always be on a sudden affray; and because the principal

¹ 4 Rep., 43.

had his clergy before judgment, the accessaries were not arraigned, upon the authority of *Syer's* case, which was recognized as settled law.¹

Notwithstanding the humor of the times was to take away clergy from certain offences, that privilege was in no disfavor in our courts, wherever an offender was entitled to it by law. Perhaps, since some felonies had been deprived of this privilege, it was thought the legislature meant to speak plainly, that all other felons were not such as merited capital punishment, and therefore their claim of clergy should be favored as much as possible, to assist the above distinction. It was the opinion of all the justices of assize assembled at Serjeants' Inn, that if a felon in a clergyable felony prayed the book, and was found not able to read, and it was recorded by the ordinary and the court *non legit ut clericus*; yet, if he should be kept in prison till another sessions, and upon being asked should read, he should still have his clergy, notwithstanding the above record. And they quoted a case in the time of Henry the Sixth, where it is said this privilege should be allowed even under the gallows. Yet they still pretended to lay down the old law upon this head; namely, that a jailer who taught a prisoner to read, would be now punished for a contempt.²

It seems that, before the statute of the 18th Elizabeth, the whole matter of granting and recording clergy was reduced to a mere formality. The following case, which happened in the fourth of the queen, will be an instance of this, as well as a proof of the necessity for stat. 8 Elizabeth, about clergy. One Stone had committed two felonies in one day, one clergyable, the other not. He was first indicted of that which was clergyable, and being found guilty, *petit librum, et tradito ei libro legit ut clericus*, and this was entered by the clerk; but no such words as *traditur ordinario*. And yet he was reprieved, without any judgment being passed; and then, at a subsequent sessions, he was indicted of the other felony, and arraigned upon it: he was found guilty of this also, *et tunc petit librum, et habuit, et legit, sed non crematur, neque traditur ordinario*, all which was so entered with a *curia advisare vult*, etc., and judgment was respited for a year; when the re-

¹ Rep., 44.

² 3 and 4 Eliz. Dyer, 205, 6.

corder of London, before whom it had been brought, proposed the question to the judges, whether he should have judgment to be hanged, or should be delivered to the ordinary as a clerk-convict; and being debated by the justices of both benches and assize at Serjeants' Inn, seven of them were of one opinion, and six of another. Catlin, the chief-justice; A. Browne, justice; Bendloe Pountrel, Welshe, and Harper, serjeants; and Gerard, attorney-general, held that he should have judgment to be hanged, because no judgment of clerk-convict had been given against him on the former indictment; and besides, the second offence, they said, should be construed more in favor of the queen; namely, that it was committed since the first arraignment, and if so, the plea of *autrefois-convict* would not avail him. On the other hand, Dyer, chief-justice; Sanders, chief-baron; Whiddon, Corbet, and Weston, justices; and Carus and Cholmley, serjeants, were of opinion that the not entering the *tradatur ordinario* was a default in the court, and should have been entered of course. His life, they said, had been once in jeopardy; and it shall not be intended that the felony for which clergy did not lie was committed before the other, for by the indictments they appear to be both done the same day, and *in favorem vitæ* the most merciful side should be taken.

It is observed by Dyer, that though the present felony was committed after the other, yet if the felon had had judgment on the former indictment, as a clerk-convict, though he was not delivered to the ordinary, he ought not to be arraigned on the second indictment; because he was discharged by the conviction from all felonies committed by him before the conviction; because he ought, according to Staunforde,¹ to be charged with all his offences before his clergy is allowed, or, at least, before he goes from the bar. For on the same day, as soon as the court have recorded *quod legit ut clericus*, he shall be said to be the prisoner of the ordinary, though he actually returned to prison from whence he was brought, otherwise the stat. *de clero* 25 Edward III., c. 5, would not be observed. There seems to have been a difference of opinion, or, at least, of practice, in the entry of the prayer of clergy; some would have it, *et tradito ei libro legit ut clericus, et tradatur ordinario*; and not

¹ Fol. 108.

in the style of a judgment, *ideo tradatur ordinario*, etc. It was said by the clerks of the King's Bench, that the latter was the form they used.¹ It appears from the case of *Holcroft* before mentioned, which though it was two years after the statute, that these entries of clergy were not regularly made; and they there held that the party should not be prejudiced by an omission of the court; but, if no clergy was even prayed, but being a clergyable offence, the judgment was respited, and it passed over in silence, as was the common way, the party should have the same benefit of it, if it was necessary to plead it on any future occasion.

The debated point, whether on a conviction of manslaughter in an appeal,² the crown could pardon the burning in the hand, was at length settled in *Biggen's* case, at the latter end of this reign. It is said, that an appeal being the suit of the party, and by stat. 4 Henry VII., c. 13, the burning of the hand being part of the punishment, it could not be remitted by the crown. But on conference with the judges it was resolved the pardon would be good; for the burning in the hand was not ordained by stat. 4 Henry VII. as a punishment, but merely to signify to the judge whether the party had had his clergy before or not. Again, it was objected, conformably with what was laid down in that former case, that the queen could not pardon the imprisonment; so now it was said, though the burning in the hand might be pardoned, yet the defendant might be imprisoned at the suit of the party; for now there was this additional reason, that by stat. 18 Elizabeth they cannot deliver the prisoner before he is burnt in the hand. But they resolved, that though by that act the prisoner, after clergy allowed and burning in the hand, should be presently enlarged; and though they held that act to extend to appeals as well as indictments, yet, they said, as the queen had pardoned the burning in the hand, the party, by construction of that act, should be discharged of his imprisonment, otherwise he must, upon the above objection, remain perpetually in prison.³

Next follow the acts concerning the coin (*a*). It had

(*a*) No subject has been the subject of more frequent, more elaborate, or more stringent legislation than this of coining. There were ancient statutes on the subject, as, for instance, the stat. *de moneta vulgo*, 21 Edward I., 27

¹ 4 Eliz., Dyer, 214, 48.

² *Vide ante*, and 3 Eliz., Dyer, 201, 67; 9 Eliz., Dyer, 261.

³ 5 Rep., 50.

been made treason by stat. 3 Henry V., c. 6, to clip, wash, round, or file the coin. This had been repealed by the general repealing act of Queen Mary. Offences against the coin. This practice, therefore, had of late been more boldly continued, as the statute says, *for wicked lucre and gain's sake*, on which account it was now enacted by stat. 5 Elizabeth, c. 11, that clipping, washing, rounding, or filing, for wicked lucre or gain's sake, of the proper money or coin of this realm, or of the money or coin of any other realm allowed and suffered to be current within this realm, by proclamation, shall be adjudged treason. But there were other ways of injuring the coin besides those described in that act, which occasioned another to be made¹ (a), which declares, that if any person, for wicked lucre or gain's sake, *by any*

Edward I., 9 Edward III., 17 Edward III., etc. (*vide* vols. ii., iii.). At common law it was a misdemeanor, of course, to coin money, but it is manifest that the character of the offence would be greatly different according to the character of the coin. If the coin were of little value, or much less than the genuine coin, it would amount to cheating; if otherwise, it would only be an offence against the royal prerogative. It need hardly be said, that ordinarily the offence was of the former character, and came to a very gross and grievous species of cheating. Hence the scope of the older statutes was to increase the punishment of the offence, and especially to make the *inchoate* acts of it more highly penal. Thus it was a question, whether it was a misdemeanor at common law to have tools for coining in possession, with intent to use them; and Lord Hardwicke dissented (*Rex v. Litton*, 1 East, P. C., 172). And the 8 and 9 William III. made it treason to have tools or instruments for coining within the possession with such intent (*Rex v. Bell*, *ibid.*, 169). Even as to having base coin in possession, with intent to utter it, the law seemed doubtful. It was indeed held that having the possession of counterfeit money, with intention to pay it away as and for good money, was an indictable offence at common law (*Rex v. Parker*, 1 Leech, C. C., 41). And that procuring base coin, with intent to utter it as good, was a misdemeanor (*Rex v. Fuller*, R. & R. C. C., 308). And the having in possession a large quantity of base coin is evidence of having procured it with intent to utter it, unless there were other circumstances to induce a belief that the defendant was the maker (*Ibid.*). But it was held that having counterfeit silver in possession, with intent to utter it as good, was no offence before the stat. 2 William IV., c. xxxiv., s. 8 (*Rex v. Heath*, R. & R. C. C., 184; *S. P. Rex v. Stewart*, R. & R. C. C., 288). And the having such silver in possession, knowingly, designedly, and illegally, knowing it to be counterfeit, was not considered an act (*Ibid.*); but getting it into possession with intent to utter it was an offence (*Ibid.*). The successive statutes framed on the subject were all in aid of each other, and formed one body of legislation, so that the penalties were often cumulative. Thus the punishment under statutes 8 and 9 William III., c. xxvi., and 11 George III., c. xl., was burning in the hand, and imprisonment not exceeding a year, and that under stat. 18 Elizabeth, c. vii., s. 30 (*Rex v. West*, 1 East, P. C., 181). But it was afterwards regulated by the stat. 2 William IV., c. xxxiv.

(a) Repealed by 2 William IV., c. xxxix.

¹ Stat. 18 Eliz., c. 1.

art, ways, or means whatsoever, shall impair, diminish, falsify, scale, or *lighten* the proper coin of this realm, or the coin of any other realm allowed and suffered to be current within this realm by proclamation, it shall be deemed treason. These two acts extend to counsellors, consenters, and aiders; and both of them save the corruption of blood which would otherwise follow upon the attainder, and also the wife's dower.

In the meantime it was, by stat. 19 Elizabeth, c. 3, made misprision of treason falsely to forge or counterfeit any such coin of gold or silver as is not the proper coin of this realm, not permitted to be current within the realm, which extends also to procurers, aiders, and abettors.

We shall now go through the felonies enacted by parliament in the order in which they arose. First, we find it was made felony, by stat. 1 Elizabeth, c. 10, to convey or procure to be conveyed into any ship or vessel any leather, tanned or untanned, or any tallow, with intent to transport them beyond sea. This, however, was repealed by stat. 18 Elizabeth, c. 9. Then stat. 5 Elizabeth, c. 10, revives the stat. 22 Henry VIII, c. 7, concerning servants embezzling their master's goods, which had been repealed by the general repealing act;¹ c. 17 of the same act revives also stat. 25 Henry VIII., c. 6, made for the punishment of buggery, which had also been repealed by the statute of Mary.

In the parliament of the 5th Elizabeth there was an act made, c. 20, to explain stat. 1 and 2 Philip and Mary, c. 4, concerning *Egyptians*. It had become a doubt whether that act was not confined to such persons who were foreigners by birth, and not to those who being born within the realm became of their company, and counterfeited their speech and manner. It is, therefore, declared by stat. 5 Elizabeth, c. 20, that the former act shall continue in force; and to remove the doubt, it enacts further, that, *every person* who shall be seen in any company of vagabonds, commonly called Egyptians, or counterfeiting, transforming, or disguising themselves, by their apparel, speech, or other behavior, like Egyptians, and shall so continue at one or several times for the space of a month, shall be judged felons, without the benefit of sanctuary or clergy;

¹ Stat. 1 Mary, st. 1, c. 1.

and, moreover, shall be tried by people of the county, and not *per medietatem linguæ*. The penalty of this act not to extend to children under fourteen years. In further explanation of the act of Philip and Mary, it is declared that it is not to be considered as compelling people born within the realm to depart, but only to leave that course of life.

As a companion to this act, the parliament in the same session passed another,¹ against *witchcraft and enchantments*, containing very severe and sanguinary penalties against these imaginary crimes. The stat. 33 Henry VIII., c. 8, had been repealed by stat. 1 Edward VI., c. 12, and as no law was now in force to punish the offenders, it was enacted by stat. 5 Elizabeth, c. 16, if any person use or practise any invocation or conjuration of evil and wicked spirits, or practise any witchcraft, enchantment, charm, or sorcery, whereby any one shall happen to be killed or destroyed, it shall be felony without clergy: and if any one be thereby wasted, consumed, or lamed, in body or member, or any of his goods destroyed or impaired, such offender is to be imprisoned for a year, and to stand in the pillory once a quarter during that time for six hours; and, for a second offence, shall be treated as a felon without benefit of clergy. And further to put an end to all practices of this kind, any person taking upon him, by witchcraft, enchantment, charm, or sorcery, to tell in what place any treasure of gold or silver, or stolen goods, might be found; or using the above practices with *intent* to provoke any one to unlawful love; or to hurt or destroy any one in body, member, or goods, is to suffer imprisonment and pillory, and for the second offence to be deemed a felon without clergy, as in case of those who do *actual* mischief.²

Thus were several former acts revived with additional severity. To these may be added stat. 1 Elizabeth, c. 7, which revives stat. 23 Henry VIII., c. 16, making it felony to sell, exchange, or deliver within Scotland, or to the use of any Scotsman, any horse.³

The exportation of sheep was restrained under severe pains by stat. 8 Elizabeth, c. 3. Any person who shall deliver, send, receive, or *procure* to be delivered, sent, or

¹ Cap. 16.

² Repealed by 4 James I., c. 1.

³ Repealed by stat. 1 James I., c. 12.

received, into any ship, any rams, sheep, or lambs, being alive, to be conveyed beyond sea, is to forfeit all his goods, half to the queen, and half to him that will sue for the same; he is further to suffer a year's imprisonment, at the end of which he is, in some market-town, in the fulness of the market, on the market-day, *to have his left hand cut off*, which is to be nailed up in the most public place of the market. The second offence is made felony. Another felony was created by stat. 31 Elizabeth, c. 4, which inflicts that penalty on persons who have charge or custody of any armor, ordnance, munition, shot, powder, or habiliments of war, belonging to the queen; or of any victuals provided for victualling any soldiers, gunners, mariners, or pioneers; and shall for lucre or gain, or of purpose to hinder her majesty's service, embezzle, purloin, or convey away any of the above-mentioned articles. This act has a clause similar to one we have before remarked upon in a statute of Edward VI., namely, that "such person as shall be impeached for any offence made felony by this act, *shall, by virtue of this act, be received and admitted to make any lawful proof that he can, by lawful witness or otherwise, for his discharge and defence.*" Miserable, indeed, was the condition of prisoners when they needed the direction of an act of parliament to secure them a fair and candid hearing, as well of their defence as of the proofs for the prosecution!

The stat. 39 Elizabeth, c. 17, concerning *wandering persons* pretending to be *mariners and soldiers*, may Wandering mariners and soldiers. in some measure be considered as a vagrant act, as to the particular persons who are the objects of it; and, indeed, contains some regulations in the spirit of that kind of police which had been established by the famous statute on that subject, of which we have before taken notice. The preamble of this statute recites, that many lewd and licentious persons wandered up and down in all parts of the realm, under the name of soldiers and mariners; and continually assembled themselves weaponed in the highways in troops, to the great terror of the people; and many murders and robberies were committed by them. It therefore enacts, that all idle and wandering soldiers and mariners, or idle persons wandering *as* soldiers and mariners, shall settle themselves in some service, or repair to the place where they were born, and take themselves to

some lawful trade ; and if they do not, they are to suffer as felons without benefit of clergy. Also, idle soldiers and mariners, who are really coming from the sea, if they have not a proper testimonial (as mentioned in the vagrant act), or if they exceed the time of their testimonial above fourteen days, or counterfeit, or knowingly have with them any counterfeit testimonial, it is made felony without clergy. However, this heavy punishment is so far alleviated, that the justices may, upon the conviction of such an offender, not proceed to sentence of death, if any honest person, approved by them, will engage to take him into his service for one year. This offence is cognizable before the justices in sessions. The act contains some other regulations respecting these kind of vagabonds.

Many outrages committed in the four northern counties occasioned stat. 43 Elizabeth, c. 13, which enacts the pain of felony without clergy on all who concur in maintaining those disorders ; such as carrying away persons, imprisoning ; taking ransom for releasing them ; spoiling or making a prey the person or goods, upon deadly feud, or otherwise ; taking money, corn, or other consideration, called there *black-mail*, for protecting persons against these outrages (as they were persons who in general were the head and maintainers of such offenders) ; or *the giving* of such money or other thing for protection ; the burning any barn or stack of grain.

Having gone through such offences as touch the life of delinquents, we come now to those of an inferior class, though not less deserving of notice. The first that present themselves in this reign, of that kind, are the new statutes made in the fifth year of the queen against *perjury* and *forgery*.

The first of these is stat. 5 Elizabeth, c. 9, an act made in aid of, and to enlarge, stat. 32 Henry VIII., c. 9, which had inflicted the penalty of £10 on the *suborners* of witnesses. This fine was too small, and it was necessary to put a restraint also upon those who committed the perjury, as well as the procurers. It therefore enacts (a), that every person who shall corruptly procure

Perjury.

(a) Upon this statute several cases were decided, which afford a remarkable illustration of the rule that penal statutes were to be strictly construed. Thus, in the present reign, one brought a suit in equity against another, and upon the bill and answer, such matter appeared that, by an order, the chan-

any witness by letters, rewards, promises, or by any other sinister or unlawful *labor* or means to commit wilful and corrupt perjury in any matter or cause depending by writ, action, bill, complaint, or information, touching lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the courts mentioned in stat. 32 Henry VIII., c. 9, before mentioned (in the Chancery, Star Chamber, Whitehall, or elsewhere within the kingdom, or marches of Wales, where any person has authority to hold plea of land by the king's commission, patent, or writ, or to examine, hear, or determine any title of land or any matter, or witnesses concerning the title, right, or interest of any lands, tenements, or hereditaments), or in any of the queen's courts of record, or in any leet, view of frank-pledge, or law-day, ancient demesne-court, hundred, or court-baron, or in the courts of the stannery; or any witness sworn to testify *in perpetuam rei memoriam*, he is to forfeit £40; and if he has not goods or lands to that value, he is to be imprisoned one-half year, and stand in the pillory an hour, in the place where the offence was committed. He is also not to be received as a witness in any court of record, until the judgment be reversed. The person who corruptly commits wilful perjury in any of the above instances, is to forfeit £20, and to be imprisoned six

cellor made a third person to be as party to the bill, and afterwards a commission went forth between him and the defendant to examine witnesses, upon which a witness was examined on behalf of the third person so made a party to the suit, and against the defendant to the suit, who thereupon sued him on the statute; but the court held that the action did not lie, for the words were—where a man is grieved and damnified in a suit between party and party; and in this case it appeared that the witness was not a party to the suit, but came in by an order, no bill being pending against him nor brought by him, and so he was out of the statute, for it being penal, is to be taken strictly (*Brodie v. Owen*, *Yelv.*, 23). So in another case, just after the close of this reign, a defendant in the suit in the Star Chamber, being examined on interrogatories, the plaintiff, supposing that he had committed perjury on his examination, procured him to be indicted on the statute, but *per totam curiam* he cannot be indicted on the statute, for he is not *testis*, but remains dependent, yet although it be upon interrogatories (*Sir Robert Miller's Case*, *Yelv.*, 120). This was aided by a more modern statute, 5 George II., c. xxv. (made perpetual by 9 George II., c. ix.), as to which it was held that the punishments inflicted by special act (18 *Geo. II.*, c. xviii.), to be inflicted upon perjury in falsely taking the freeholder's oath at an election of a knight of the shire, are cumulative under the stat. 5 Elizabeth, c. ix., s. 6, and 2 George II., c. xxv., s. 2, to which the first-mentioned statute refers (*Rex v. Price*, 6 *East*, 327). There are a great number of perjury clauses in various acts of parliament, each relating to the oaths respecting the subject-matter of those acts respectively.

months; and his oath, in like manner, not to be received in any court of record, till the judgment be reversed. And if he has not goods or chattels to the value of that sum, he is then to be set on the pillory, and there to have both his ears nailed; *and thenceforth* to be discredited and disabled to be sworn in any of the courts of record above mentioned.

As to the cognizance of this offence against the administration of justice, it is enacted, that as well the judge of every of the above-mentioned courts, where any such suit shall be depending, and whereupon the perjury is committed, as also the justices of assize and gaol-delivery, and the justices of the peace in their sessions, may hear offences against this act by inquisition, presentment, bill, information, or otherwise. This act¹ is not to extend to any ecclesiastical court; nor to be construed to restrain the Star Chamber² in their jurisdiction over the same crime. This act is directed³ to be proclaimed at the assizes.

These are the provisions made in restraint of perjury, and subornation of it, by this statute; there is a clause also regarding witnesses, which is worthy of notice: it enacts, that persons served with process out of any court of record to testify concerning any matters depending in those courts, and having tendered, according to *his countenance* or calling, a reasonable sum for his costs and charges, and not appearing according to the tenor thereof, shall forfeit £10, and make further recompense to the party grieved as shall be awarded by the discretion of the judge of the court.

The statute 5 Elizabeth, c. 14, repeals all former statutes against forgery of false deeds,⁴ and enacts several new provisions to punish this offence.

Forgery.

It ordains, first, that if any person shall falsely forge, or make, or cause or assent to be falsely forged or made, any false deed, charter, or writing sealed, court-roll, or will in writing, to the intent that the *freehold or inheritance* of any one, in lands, tenements, or hereditaments, freehold or copyhold, or any right, title, or interest in them, shall be molested, defeated, recovered, or charged, or shall publish the same, and shall be convicted upon an action of forger of false deeds, or upon bill, or information in the Star

¹ Sect. 11.

² *Ibid.*, 13.

³ *Ibid.*, 10.

⁴ *Ibid.*, 11.

Chamber, he shall pay to the party grieved double costs and damages, to be assessed by the court where the conviction shall be; and shall also be set on the pillory, and there have his ears cut off, and his nostrils slit and cut, and seared with a hot iron: he shall also forfeit to the queen the profits of his lands during life, and suffer perpetual imprisonment.

If the same be done with intent to claim any interest for term of years, in any lands, tenements, or hereditaments, or an annuity in fee-simple, fee-tail, or for life, or years; or any obligation or bill obligatory, acquittance, release, or other discharge of a debt, action, demand, or other thing personal, or shall publish the same, such offender shall in like manner pay double costs and damages, shall be set on the pillory, and there have one of his ears cut off, and be imprisoned for a year.¹

The remedy given to the party grieved upon this act is, either by action of forger of false deeds by original, or by bill in the King's Bench or Exchequer. If by original, to have the same process as in trespass at common law.² The second offence is made felony without clergy, with a saving of dower, and the corruption of blood.

Two other statutes remain to be noticed, one against fond and fantastical prophecies; the other for the punishment of the father and mother of a bastard child.

The former is stat. 5 Elizabeth, c. 15, made in the same sessions, and standing next before that against witchcraft and conjuration, to which it may be considered as somewhat allied: it ordains, if any one do publish, and set forth by writing, printing, signing, or any other open speech, or deed, any fond, fantastical, or false prophecy, by the occasion of any arms, fields, beasts, badges, or such like thing, accustomed in arms, cognizancy, or signets; or by reason of any time, year, or day, name, bloodshed, or war, to the intent to make any rebellion, insurrection, dissension, loss of life, or other disturbance within the realm, he shall be imprisoned for one year, and forfeit £10; for the second offence, to be imprisoned during life, and forfeit all his goods and chattels. The prosecution to be within six months. There had been an act of this kind made in the reign of Edward VI.,³ which had expired;

¹ Sect. 3.² Ibid., 9.³ Stat. 3 and 4 Edw. VI., c. 15.

and the queen, whose apprehensions were greater on this point than those of any of her subjects, was desirous of reviving some restriction upon such disturbers of her peace.

The other, concerning the punishment of the father and mother of a bastard child, is a provision perfectly new. This is made by stat. 18 Elizabeth, c. 3, which ordains that two justices, one to be of the *quorum*, in or next the limits where the church of the parish is in which a bastard shall be born, may take order, as well for the punishment of the mother and reputed father, as also for the better relief of such parish; and may likewise take order for the keeping of the child, by charging the father or mother with payment of money weekly, or other sustentation: and if they do not perform the order, they are to be committed to the common gaol, except they put in sufficient surety to perform the said order, or to appear personally at the next general sessions, and to abide such order as the justices then and there shall take; and if they take no order, then to perform the order before made.—But the bastards intended by this act are such only as are likely “to be left to be kept at the charge of the parish where they were born, to the great burden of the same, and in defrauding of the relief of the impotent and aged poor,” as described in the preamble; and the statute, in the enacting clause, refers to it in the words “such bastards.”

Punishment of
the father of a
bastard child.

Among other regulations of the police, the new order made respecting hue and cry must not be omitted. This ancient method of pursuing offenders at present stood upon two old statutes, the stat. of Winchester, 13 Edward I., st. 2, c. 1, and stat. 28 Edward III., c. 11 (a). It seems this proceeding had of late

Of hue and cry.

(a) This act, said Lord Coke, added to the statute of Winchester, and altered it in some points. By the old statute it was not necessary to have hue and cry, or that the party robbed should give notice to the county; and if there were several robbers, the hundred were bound to take all of them; though this would not apply to robberies in a house, or by night, except in towns, where, by the statute of Winchester, the walls should be closed at night. But by the statute of Elizabeth it was provided that notice of the robbery should be necessary, and that if some of the robbers were apprehended in the pursuit, it should excuse the hundred (*Cases on the Statute of Winchester*, 6 *Coke's Reps.*, 7). It was on the principle of this ancient statute that the above statute proceeded, which only in other respects altered the procedure. It may be added, that it was upon the general principle of the

been put in use more frequently than heretofore, and had therefore furnished many experiments of its defects, which

ancient statute the modern act of George I. rendering the hundred liable for damage done by rioters proceeded. The statutes of hue and cry did not, it was held, extend to robberies on the person committed in the daytime. It was at first, indeed, held otherwise, and that they applied to robberies in the house and at night; but this was overruled towards the close of this reign, and it was laid down that for a felony done in the night the hundred should not be charged; and so of a robbery in the house in the daytime. For the statute of Winton, it was said, extends only to robberies done to the person, and was principally made for the safeguard of travellers; but every one ought to keep his house at his peril, for it is his castle, and no other ought to meddle them, and therefore it is not reason that any one should be charged if he be robbed there. And it was also said that if beasts be stolen out of a close, and hue and cry was made, yet the hundred should not be charged, for the hundred should not be charged but where the party robbed gave notice in convenient time, which cannot be done by intentment where the beasts are stolen in his absence (*Anonymous Case, Cro. Eliz.*, 753). *Vide* 29 Charles II., c. vii., 6 George I., c. i., 9 George I., c. xxii., 8 George II., c. xvi., the modern statutes on the subject. But held that the hundred was liable for robbery committed after daybreak, and before sunrise (*May v. Morley, Cro. James*, 106). After this statute a plaintiff declared on the statute of Winton, 13 Edward I., and showed that he had performed the limitations of ordinances in the statute 27 Elizabeth, and concluded *contra formam statuti prædicti*, and the issue being found for the plaintiff, it was alleged in arrest of judgment that the declaration was not good, because, he having declared on two statutes, the stat. 13 Edward I. and the stat. 27 Elizabeth, he ought to have concluded *contra formam statutorum*; but *non allocatur per totam curiam*, because the action in this case is given and grounded only on the statute 13 Edward I., and the statute 27 Elizabeth is rather in restraint and hindrance of the action than otherwise, for whereas before the statute 27 Elizabeth the party might have had his action generally, to have charged the hundred on any robbery, now certain circumstances are to be performed by the statute 27 Elizabeth before the party shall have his action, viz., the taking of the oath before a justice that he was robbed, and that he does not know the felons, etc. So that the statute 27 Elizabeth was made in ease of the hundred, and not in advantage of the party robbed; therefore it is sufficient to conclude *contra formam statuti*, which shall of necessity have reference to the statute 13 Edward I., which gives the suit. And several precedents were shown accordingly. And *per curiam*, if the plaintiff had concluded *contra formam statutorum*, it had not been good, because the statute 27 Elizabeth does not enable the party to sue (*Andrew v. The Hundred of Lewkner, in comitatu Oxon, Yelv. Reps.*, 116). This statute was afterwards superseded by the 8 George II., c. xvi., based upon the same general principle. In following up a writ of execution to its consummation under the statute of hue and cry, 8 George II., c. xvi., which the subsequent statute of the 19 George II., c. xxxiv., refers to and adopts as the mode of proceeding in a case of a penalty recovered by the executor of a revenue officer, killed in the pursuit of smugglers, against the inhabitants of the hundred (or of a lath in Kent), it is sufficient for the sheriff, to whom the writ had been delivered, to return, even after the expiration of sixty days, given him by the act to return the writ, that he had delivered it to the justices of the peace of the hundred, etc. (who are charged with the duty of directing the levy on the inhabitants), and that they had done nothing upon it; and the court will not thereupon attach the sheriff for not returning the writ, but the next proceeding is

it was now attempted to remedy. It was thought a hardship upon a hundred to be, in all events, liable to the party

against the magistrate, to oblige them to their duty (*Wright v. Augustine*, 13 *East*, 544). The stat. 1 George I., stat. 2, c. v., made provision with respect to persons injured and damnified by the demolishing or pulling down of any dwelling-house by persons unlawfully, riotously, and tumultuously assembled. This statute directs, that at the plaintiff's complaint made to the justices of the town at any quarter-sessions, the damages shall be raised and levied on the inhabitants of the town, and paid to the plaintiff in the manner directed by the above statute, 27 Elizabeth, which, it will be observed, provides only for relief of the particular inhabitants of a hundred, upon whom the damages recovered against the hundred may have been levied, and directs that, upon complaint made by the parties so charged, two justices of the county shall tax the hundred; and the statute was confined to the hundred. The 37 George III., c. xix., extended the remedy to all cases of injury: "That in every case where any house, shop, or other building whatever, or any part thereof, shall be destroyed, or shall be in any manner damaged or injured, or where any fixtures thereto attached, or any furniture, goods, or commodities whatever which shall be therein, shall be destroyed, taken away, or damaged by the acts of any riotous or tumultuous assembly of persons, or by the acts of any persons engaged in, or making part of, such riotous or tumultuous assembly, the inhabitants of the city or town in which such house, shop, or building shall be situate, if such city or town be a county of itself, or is not within any hundred or otherwise, the inhabitants of the hundred in which such damage shall be done shall be liable to yield full compensation in damages to the person or persons injured and damnified by such destruction, etc., and such damages shall and may be recovered by the same means and under the same provisions as are provided in the 1 George I., c. v., above mentioned. These are the statutes relating to damage done by riotous and tumultuous assemblies." There is another series of statutes, founded on the ancient statutes of hue and cry, relating to robbery. The 8 George II., c. xvi., relates to the statutes of hue and cry. It directs that, in actions against the hundred, the process shall be served on the high constable, who is to defend; and if the plaintiff obtains judgment, the sheriff is to produce the writ of execution to two justices of the county, who are to make an assessment, as directed by the statute of Elizabeth, and are to include therein, in addition to the damages and costs recovered by the plaintiff, the necessary expenses of the high constable in defending the action. The 22 George II., c. xlvi., extends the remedy given by the 8 George II. to all actions against the inhabitants of any hundred, and directs the sheriff to produce the writ of execution to two justices of the peace of the county, as directed by the 8 George II., and thereupon requires the justices to raise by taxation as well the costs and damages recovered as the expenses incurred by any inhabitant in defending the action. The general principle of the modern statutes which rendered the hundreds responsible for damage done by rioters was, it will be obvious, the same as that under which, by the old law, the hundreds were liable for robbery. The 9 George I. was superseded by more modern statutes. The 3 George IV., c. xxxiii., s. 2, gave a summary remedy to the extent of £30 against the hundred, for injuries done to property by riotous assemblies, on application to the petty sessions in the manner therein prescribed. Where the damages sustained by means of the unlawfully and maliciously setting fire to any house, barn, outhouse, mow, or stack of corn, etc., was less than £30, the remedy by action, given by the 9 George I., c. xxii., s. 7, to the party grieved, was taken away, and a summary remedy substituted for it by 3 George IV., c. xxxiii., although the injury had not

robbed; while the inhabitants had, perhaps, done everything in their power towards pursuing the offender, in which the neighboring hundred would not assist, by furthering the hue and cry, knowing that they were not concerned in making good the loss sustained by the party robbed. Again, the person robbed, confiding in the remedy he had against the hundred, would remit of any attempt or diligence in taking the offender. To remedy all this, it was enacted by stat. 27 Elizabeth, c. 13, that the inhabitants of any hundred wherein there shall be negligence, or default of fresh suit, after hue and cry made, shall pay one moiety of the damages recovered; which contribution is to be recovered by an action at the suit of the clerk of the peace.

been done by a riotous and tumultuous assembly (*Rex v. Somerset, Justices, D. & R.*, 385; 4 *B. & C.*, 913). Then came the later statute of 7 and 8 George IV., c. xxxi., s. 8, under which there might be a proceeding for compensation in respect of felonious injury by rioters. The party or his servant must go before a justice within seven days after the offence was committed, and submit to examination, etc., according to s. 3 of that act, as well as where an action is to be brought (*Rex v. Folkestone, Justices*, 4 *B. & Adol.*, 552; *Duke of Newcastle v. Broxtowe, ibid.*, 273). Some of the cases upon the subject of the liability of the hundreds under these statutes have been exceedingly interesting, and illustrative of our legal history, as showing the extreme antiquity of these divisions, and the weight attached in our law to tradition and reputation. Thus, in an action in 7 and 8 George IV., c. xxxi., against the hundred of *B.*, for the felonious demolition of *N.* castle by rioters, the plaintiff produced in evidence certain orders made by the justices at the quarter-sessions for the county, in which the castle was described as being in that hundred. No proof was given that the justices who made those orders were residents in the county: Held, that the orders were admissible as evidence of reputation, for that the justices, from the nature of their offices, must be presumed cognizant of the subject (*Duke of Newcastle v. Broxtowe*, 4 *B. & Adol.*, 273). It was proved by other evidence, that for nearly two centuries the castle of *N.* had been reputed to be within the hundred of *B.* The defendants attempted to prove that the town of *N.* had been from the earliest period separated from the jurisdiction of, or connection with, the adjoining hundreds, and for that purpose gave in evidence an extract from Domesday Book, in which the town was mentioned previous to the enumeration or description of the hundreds in the county, and various presentments during the reigns of Edward I., Edward III., and Henry VI., by the jurors of the town of *N.*, of deaths within the castle and its precincts; and they produced a charter of Henry VI., whereby the town of *N.* was made a county of itself, and the castle was specially excepted. The judge, after recapitulating the evidence, told the jury that the excepting of the castle when the town was made a county did not show in what hundred the castle originally was; that the evidence of reputation given by the plaintiff was entitled to great weight, and that when things had gone on for two centuries in one uniform course, it was reasonable to infer that that course had prevailed from the earliest period, unless the evidence to the contrary was certain. It being objected that by this summing up, too much weight was given to modern reputation, and too little to the ancient documents: Held, that the direction was proper (*Ibid.*).

Again, because the recovery upon the two former acts used to be against one or very few of the inhabitants, who could not obtain by law any contribution from the rest, and were thereby often entirely ruined, it was now enacted that after execution had, two justices within or near the hundred may assess ratably and proportionably all towns, villages, and parishes, hamlets, and franchises, in the hundred towards an equal contribution; after which, the constable and headboroughs of such places shall tax the inhabitants within their district, to be levied by distress, and to be paid to the justices within ten days after collection (a). The same method to be followed within the

(a) So, as to sewers, or highways, or bridges, at common law, as Lord Coke points out, the inhabitants could tax themselves for necessary local purposes, and were, indeed, bound to do so; and the obligation was only enforced and extended by the various statutes on the subject. Thus it was as to the commissions of sewers: It was provided by 23 Henry VIII., c. v., that the laws, acts, etc., to be made by the commissioners of sewers should stand good and effectual when certified under their seals into the king's court of chancery, and the royal assent be had to the same. And by 13 Elizabeth, it was enacted that these laws, etc., should stand and continue in force without any such certificate to be made thereof into Chancery. And under these statutes the commissioners had full authority to levy rates, etc., for the purpose of maintaining the sewers. So, as to highways: This also is the proper place in which to notice the law on this important subject, which our author had entirely neglected. At common law, that is, by the ancient customs of the realm, the parishioners were bound to keep the highways in repair within their respective parishes (unless there were any other parties liable, *ratione tenuræ*, or by prescription or otherwise), and were indictable for neglect of that duty. But a series of subjects passed on the subject founded on this general principle, and designed to render the remedy more effectual. The 2 and 3 Philip and Mary, c. viii., provided that the constables and churchwardens of every parish, with the inhabitants, were to choose surveyors of the highways to be appointed for repairing the ways. Persons having teams or plough-lands were to send out teams, and cottagers were to work. Offences against the act were inquirable and punishable at the leet. By the 5 Elizabeth, c. xiii., powers were given to the surveyors of highways to turn water-courses, dig for gravel, and present for defaults; and by the 18 Elizabeth, c. x., persons having a plough-land in several parishes were chargeable with a team only where they resided, and penalties were imposed for neglect. Then by the 22 Charles II., c. xii., further penalties were imposed; and persons resisting employment were made liable to penalties. Statutes 3 and 4 William and Mary, c. xix., and 8 and 9 William III., c. xvi., made further provision as to enlargement of highways, removal of obstructions, etc.; and 1 George I., c. xlviii., contained further provisions on the subject; all superseded by the 13 George III., the first general highway act, in its turn superseded by the 5 and 6 William IV. In an indictment on 22 Charles II., c. xii., s. 9, for not sending a cart and men to the six days' highway labor, pursuant to an order from the overseers, the particular remedy given by the act was held cumulative, because it was an offence indictable at common law (*Rez v. Boyall*, 2 Burr., 832; 2 Lord Ken., 549). It may here be con-

hundred where there has happened default of fresh suit. Further, where one out of many offenders is taken by

venient to mention the law as to the cognate subject of bridges, for the repair of which, by the common law or custom of the realm, the counties were *prima facie* liable. By stat. 22 Henry VIII., c. v., it is provided that justices in sessions should hear and determine complaints of non-repair or defect of bridges, and to charge such as should repair; and when it could not be known who ought to repair, the county was to be taxed. And by 1 Anne, c. 18, the quarter-sessions, upon presentment that a bridge was out of repair, were to assess every town and parish. Under these laws, common law and statute, the counties were *prima facie* liable for repair of bridges, and the parishes for repairs of roads. But these liabilities only applied to public highways, and, in the absence of special liabilities, upon particular parties. Thus, for instance, if the commissioners under an inclosure act set out a private road for the use of the inhabitants of certain parishes, directing them to keep it in repair, no indictment lies against them for non-repair, as it does not concern the public (*Rex v. Richards*, 8 T. R., 633); so a corporation may be chargeable with a prescriptive liability to repair the roads within the town (*Rex v. Liverpool*, 3 East., 86). Thus the parishioners also are *prima facie* liable, and cannot be discharged by mere agreement with others (*Ibid.*). So individuals may be liable to repair either roads or bridges, *ratione tenuræ* (*Rex v. Kenyon*, 1 M. & G., 435). And the inhabitants of a particular township may be liable to repair a bridge within it, or such parts of a highway as may be within it (*Rex v. West Riding*, 4 B. & A., 623; *Rex v. Ecclesfield*, 1 B. & A., 348). So, by turnpike acts, or other particular acts, particular parties may be liable to repair certain roads (*Rex v. Cumberwell*, 3 B. & A., 108). So charters often cast upon cities and boroughs or corporate towns the burden of repairing these roads, etc. The obligation was often upon religious houses or guilds, or other corporations dissolved by the suppression-statutes of Henry VIII. and Edward VI., and these dissolutions often caused questions as to the transfer of the obligations. The cases on such particular liabilities by charter or prescription often go back to very remote periods. Thus, for example, in a case where a county indicted for the non-repair of a foot-bridge, they pleaded that it was parcel of a carriage-bridge, which A. B. was bound to repair, *ratione tenuræ*, and replication admitted the liability of A. B., to repair the carriage-way, but denied that the foot-bridge was parcel of the same; whereupon issue was joined. The evidence was, that the carriage-bridge mentioned in the pleadings had been built before 1119, and that certain abbey lands had been ordained for the repair of the same, and the proprietors of those lands (of which those mentioned to be held by A. B. were part) had always repaired the bridge so built. In 1736 the trustees of a turnpike-road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot-bridge along the outside of the parapet of the carriage-bridge, partly connected with it by brick-work and iron pins, and partly resting on the stone-work of the bridge: Held, that this, being the foot-bridge mentioned in the indictment, was not parcel of the carriage-bridge, which A. B. was bound by tenure to repair, and consequently that the county was liable to repair the foot-bridge (*Rex v. Middlesex*, B. & A., 201). The following case is extremely illustrative of the history of the law upon the subject: A charter of Edward VI., granted upon the recited prayer of the inhabitants of the borough of Stratford-upon-Avon, that the king would esteem them, the inhabitants, worthy to be made, reduced, and erected into a body "corporate and politic," and thereupon proceeding to grant unto the inhabitants of the borough, "that the same borough should be a free borough forever thereafter;" and then proceeding to in-

fresh suit, no hundred is to be liable. A hue and cry will not be sufficient to satisfy this act, unless it be made by horsemen and footmen. All actions against the hundred are to be brought within one year after the robbery; and no person is entitled to an action unless he gave notice of the robbery to some inhabitant of the first village or hamlet nearest the place where the robbery was committed; and, unless within twenty days next before the action brought, he be examined before some justice, whether he knows any of the offenders; and if he does, he is to enter into a recognizance to prosecute.

corporate them by the name of the bailiffs and burgesses, etc., which would, without more, imply a new incorporation; and where the same charter recited that it was an ancient borough, in which a guild was theretofore founded and endowed with lands, out of the rents, revenues, and profits of which a school and an alms-house were maintained, and a bridge was from time to time kept up and repaired; which guild was then dissolved, and its lands lately come into the king's hands; and further reciting, that the inhabitants of the borough, from time immemorial, had enjoyed franchises, liberties, free customs, jurisdictions, privileges, exemptions, and immunities, by reason and pretense of the guild, and of other charters, grants, and confirmations to the guild and otherwise, which the inhabitants could not then hold and enjoy by the dissolution of the guild, and for other causes, by means whereof it was likely that the borough and its government would fall into a worse state without speedy remedy; and thereupon the inhabitants of the borough had prayed the king's favor for bettering the borough and government thereof, and for supporting the great charges which from time to time they were bound to sustain, to be deemed worthy to be made, etc., a body corporate, etc.; and thereupon the king, after granting to the inhabitants of the borough to be a corporation (as before stated), granted them the same bounds and limits as the borough and the jurisdiction thereof from time immemorial had extended to: and then the king, "willing that the alms-house and school should be kept up and maintained as theretofore (without naming the bridge), and that the great charges to the borough and its inhabitants from time to time incident might be thereafter the better sustained and supported, granted to the corporation the lands of the late guild: and it further appearing by parole testimony, as far back as living memory went, that the corporation had always repaired the bridge: Held, that taking the whole of the charter and the parole testimony together, the preponderance of the evidence was, 1st, that this was a corporation by prescription, though words of creation only were used in the incorporating part of the charter of Edward VI.; 2dly, that the burden of repairing the bridge was upon such prescriptive corporation during the existence of the guild before that charter; though the guild, out of their revenues, had in fact repaired the bridge, which was only in case of the corporation, and not *ratione tenuræ*, and that the corporation were still bound by prescription, and not merely by tenure; and therefore that a verdict against them upon an indictment for the non-repair of the bridge, charging them as immemorially bound to the repair of it, was sustainable" (*Rex v. Stratford-upon-Avon, Mayor, etc.*, 14 East, 348).

CHAPTER XXXV.

ELIZABETH.

WARDSHIPS—GUARDIAN IN SOCAGE—GRANT OF ENTAIL TO THE CROWN—PREROGATIVE OF THE CROWN AS TO MINES—GRANTS OF REVERSIONARY INTERESTS—LEASES—LAW OF DESCENT IN FEE-SIMPLE—THE USE OF A TERM NOT EXECUTED BY THE STATUTE—OF TRUST-TERMS, AND OTHER TRUSTS—THE COURT OF CHANCERY—JUDICATURE OF THE MASTER OF THE ROLLS—EXECUTORY DEVISES—COVENANTS TO STAND SEIZED—OF FEOFFEEES TO A USE—THE CASE OF PERPETUITIES—SCHOLASTICA'S CASE—LAW OF FORFEITURE—ACTION OF ASSUMPSIT—ACTIONS BY BILL IN KING'S BENCH—ACTIONS BY ORIGINAL—OF EJECTMENT—THE STATE OF LEARNING—CONVEYANCES—LAW OF USES—PROVISOS, EFFECT OF—PLEADING—THE COURT OF HIGH COMMISSION—CRIMINAL LAW—MURDER AND HOMICIDE—OF MANSLAUGHTER AND CHANCE-MEDLEY—BURGLARY—NEW COMMISSION OF THE PEACE—THE QUEEN AND GOVERNMENT—TRIAL OF THE DUKE OF NORFOLK AND OTHERS—OF TRIALS FOR TREASON AND OTHER OFFENCES—REPORTERS—PLOWDEN—COKE—LAW-TREATISES—RASSELL—BROOKE—LAMBARD—MISCELLANEOUS FACTS.

IN the course of this long reign the courts were called upon to determine questions of every kind; and many points of great importance were settled by solemn adjudication (a). It will be sufficient for the design of this work

(a) "Wardship," observes Hume, "was the most regular and legal of all the impositions by prerogative; yet was it a great badge of slavery, and oppressive to all the considerable families. When an estate devolved to a female, the sovereign obliged her to marry any one he pleased." (In this the historian was mistaken; there was an alternative, to pay as a pecuniary fine the sum to which the lord would have been entitled had the marriage taken place.) "Whether the heir was male or female, the crown enjoyed the whole profit of the estate during the minority. The giving of a rich wardship was a usual method of rewarding a courtier or favorite" (*Hist. Eng.*, vol. v., App. iii.). The error into which the historian fell, of imagining that the feudal law could compel the female ward to marry whom he pleased, affords an illustration of the importance of a knowledge of law for purposes of history, and of the mutual explanation of history and law. Had it been that the lord could compel the ward to marry whom he pleased, the condition of the ward would have been infinitely worse, and the feudal system infinitely more odious and oppressive, than it was; so much so, indeed, as to have been utterly unendurable. And there is reason to believe that under some of the earlier Norman sovereigns it actually was so, and caused civil war. But it had long ceased to be so, and even the feudal system had fallen under the moderating influences of law. The law was, that the lord

to select such as are more striking, and relate to those subjects whose history we have deduced in the preceding pages.

could tender a reasonable and befitting marriage to his ward. Lord Bray, for £800, sold the guardianship and marriage of his son to four of the privy council, by name, on behalf of the king, to the intent to be married by the appointment or nomination of them or their assigns, without disparagement, he being seized of certain lands in Berkshire and Buckinghamshire; those in Berkshire held in chivalry (*i. e.*, knight-service) *in capite*, with covenant to convey the land in Buckinghamshire to the four, with intent to find him such a wife as he shall marry by their appointment before twenty-one, etc., and then the land limited to their issue; and one of the four died, and Lord Bray died, and then the king seized the ward, and granted the marriage to the Earl of Shropshire, who married his daughter to the son of Lord Bray by the assent of the king and appointment of the survivors, and the son had afterwards attained his majority (*Dyer's Reps.*, 47). The case came before the court thus: The young Lord Bray, after coming of age, sold his Berkshire lands, and then died, and his wife entered on the lands, and the purchaser claimed them, and several questions were raised; one of which was, whether the father could grant the marriage of his son; and three judges held that he could not, as it was an authority inseparable from his person, and ended by his death; but two judges held otherwise, that it was an interest; but of these, one agreed with the other three, that the authority conveyed by the grant was terminated by the death of Lord Bray. Also, it was held that the king, by grant under seal of the Court of Wards, had waived his interest; and that there was concurrence in the marriage was not material, and that it was the marriage of the earl only (*Ibid.*). Near the end of the reign of Elizabeth, the old writ *de valore maritagii* was brought by a grantor of the marriage against one Sir Denham and Mary, his wife, daughter and heir of Buckland; and he stated that Buckland held of the queen by knight-service *in capite*, and died — Mary, his daughter and heir, being within fourteen years of age; and that the queen seized the ward, and granted it to the plaintiff's father, who died possessed, and made the plaintiff his executor, whereby he was possessed, and tendered a proper marriage to the said Mary when she was within age, to wit, one Badger, and that she refused. She denied the tender, and the plaintiff demurred, on the ground that he was not bound to tender the husband; but the court held that he was; for otherwise there would be great mischief to the heir, for peradventure the wife offered might be of such deformity that none would marry with her; and in case of a female it was still more clear (*Nevell v. Sir Denham, Cro., Eliz.*, 268); and that if it was refused, he then was entitled to the amount to which he would have been entitled, had the marriage actually taken place. So that it came to a pecuniary penalty, and the amount, like that of a relief, was virtually fixed and ascertained, being measured by the amount of the annual value of the estate. Thus a "relief" was half a year's annual value: so that if the estate was worth a thousand pounds a year, the relief would be five hundred; so of a marriage. But though the only practical result of the feudal system was a certain amount of pecuniary imposition, it was still no doubt oppressive, and was regarded with such disfavor in the courts, that it was on every occasion restrained as far as possible by a construction rather strict, and against the lord. Of this many instances might be given from the law-books of the reign. In the reign of James I. occurred the last recorded case of a suit by the lord for "ravishment of ward," as it was called, that is, removal of the ward beyond the control of the lord, so as to prevent him from realizing the

In the reign of Edward the Sixth, it had been held, as we are told in the case of *Sir Anthony Brown*, Wardship. that where the son of one holding in knight-service was made a knight in the lifetime of his father, he should nevertheless be in ward if his father died before he was of age: for otherwise the father might procure him to be made a knight by collusion, in order to defraud the lord of his ward; so that he agreed with the crown for his marriage. Though Brooke was of opinion it should be otherwise where he was made knight during his infancy and wardship; for then he thought he was within the provision of Magna Charta, c. 3.¹ This question was again brought forward in the case of *Sir John Ratcliffe*, in the early part of this reign. When called upon by the Court of Wards for the value of his marriage, that gentleman's counsel said that, as he was enabled to do knight-service by having received knighthood from the king, *who*

profits of wardship (*Moore v. Hussey, Hobart's Reps.*). In that case the ward had been married, and the lord claimed eight hundred pounds as the "value" of the marriage. He had judgment, and though it was reversed in error on a technical point, his right was upheld. There remain still in this reign some remains of the ancient serfdom of the peasants (*Rymer*, tom. xv., p. 731), but none afterwards (*Hume's Hist. Eng.*, vol. v., App. iii.) The last reported case of villenage occurred at the end of this reign, and it proved abortive (*Dighton v. Bartholomew, Yelv.'s Reps.*, 15). In the 44 Elizabeth, one Dighton brought a writ *de nativo habendo* against one Bartholomew (claiming him as his villein) in the county court, and it was removed into the Common Pleas; but on the day of the return Dighton did not appear, and judgment was given that Bartholomew should be enfranchised forever. And though the judgment was reversed it was for mere error of procedure, and if the plaintiff and defendant had appeared, the plaintiff would have had to allege "seisin in fee," and to have produced some of the defendant's blood, who acknowledged himself to be villein (*Dighton v. Bartholomew, Yelverton's Reps.*, 2). It was little likely that at that time such evidence could ever be given; and as the villeins had by degrees wandered away from their lords, the difficulties in the way of proof were almost insuperable, and the system died out. In Dyer's Reports of the same reign, there are one or two notes of cases on villenage (*Dyer*, 12). In one of these the owner of a manor, with a villein regardant, enfeoffed the villein of an acre belonging to the manor, and it was said, that the issue must recover the land before he could recover the villein (*Ibid.*). There was also a case in which it was held that a lord who had not seized nor claimed his villein for a hundred years, so that a writ of *nativo habendo* would not lie against the issue of the villein, because of the statute of limitations of 32 Henry VIII., could not seize the issue. So held, *in favorem libertatis*, in a case of *Butler v. Crouch (Dyer's Reps.*, 18). In the hundreds of cases reported by Dyer during the Tudor reigns, these are the only cases mentioned on the subject of villenage. It is evident that it was fast dying out.

¹ 2 Edw. VI., New Cases, 155.

is the captain of all chivalry, there was not the pretence of imbecility and inability of an heir within age to demand it; and as the cause did not exist, there was no reason for the effect of it to be made a burden upon the minor. And to enforce this they cited the same provision of Magna Charta; from which, they said, it appeared that by the common law, if the ward was made a knight during his nonage, he should be out of ward; and if it was the degree of knighthood which had this effect, there was the same reason for the exemption if it was conferred in the life of the ancestor.

Upon this the court took some time to consider the question; for though it had been frequently made, yet we are told by Plowden that the parties had always compounded; so that the above case of *Sir Anthony Brown* seems not to be an adjudication, but only an opinion. But Sir John Ratcliffe would not compound, but demanded law and justice. As this was likely to be a precedent, the court were three years before they made a decree, by which they adjudged that no marriage was due to the queen.¹

Some difficulty was found in the following case:—
Lands descended on the part of the wife were settled by fine on the husband and wife, and the heirs of the body of the husband, remainder in fee to the heirs of the wife; the husband and wife die, leaving an heir under fourteen years; and there arose a contest between the grandfather on the part of the father, and the grandmother on the part of the mother, which should be guardian in socage (a). On account of the two estates,

Guardian in
socage.

(a) Upon the abolition of the feudal system a statute passed, 12 Charles II., c. xxiv., by which power is given to parents to appoint guardians for their children, until they came to the age of twenty-one. And by the 4 and 5 Anne, c. xvi., action of account lies against guardians. The Court of Chancery has, ever since the act of Charles II., exercised its jurisdiction over guardians, testamentary or otherwise (*vide Eyre v. Shaftesbury*, 2 Peere William's Reps.). When a committee of the person or estate has been appointed in Chancery, he is in that character responsible only to the jurisdiction of the great seal (*Anon. v. Parkinson*, 2 Ph., 328). The jurisdiction is exercised in matters of guardianship on the principle that the interest of the infant is to be consulted as the governing consideration, as it used to be in guardianship in socage, not as it used to be in guardianship in chivalry, where the interest of the guardian or the party entitled to the wardship was chiefly considered. The general jurisdiction exercised by the Court of Chancery is quite independent of the right of guardianship conferred by the statute. The appointment of a testamentary guardian of an infant, by his father, does not, under

¹ 6 Eliz. Plowd., 267.

one in tail and one in fee, which descended, the Court of Ward saw some doubt in the question, and so took the advice of Lord Dyer and Saunders, chief-baron, who were of opinion that the ward of the body belonged to the grandfather, on the part of the father, who was likewise entitled to the guardianship of the socage land.¹

The interest of a guardian in socage was esteemed to be for the benefit of the infant, and not of the guardian; so it did not go to executors, nor could it be forfeited to the king. It was upon this reasoning determined in the King's Bench, that when the husband of a guardian in socage intermeddled so far as to join in making a lease, the widow, after his death, might enter, and avoid it.²

It seems strange, that so many years after the statute *de*
Grant of entail to the crown. *donis*, it should be agitated, as a matter of doubt, whether land could be entailed in the king and his issue under that act. But so it is, that this point was contested in the fourth of the queen, in the famous case of *Wilson v. Berkeley*. A Lord Berkeley had granted lands, with remainder to Henry VII., and the heirs male of his body, with remainder to his own right heirs. Henry VIII. made a grant of the land for life; and then Edward VI. granted the reversion in fee: and now, upon the death of Edward VI., without issue, it was apprehended the estate-tail was extinct, and that the remainder should take effect in possession; and, after much argument, it was held by the Court of Common Pleas (that is, by Lord Dyer and Anthony Brown, the other judge not being present), with the dissent of Weston, that it was an entail in the king, and not a fee-simple conditional at common law, as had been contended.

But Weston argued, that the rule respecting grants to the king was exactly the reverse of that which applied to those of common persons; for all grants to the king were to be construed most strongly in his favor, and against the grantor. Thus, if a part of a thing entire came to the king, the law gave him the whole; as if one of two obligees is outlawed, the king has the whole duty. If one grants to the king all the presentments that shall happen within

the stat. 12 Charles II., c. xxiv., constitute any objection to the appointment of a receiver of the estate of the infant (*Gardner v. Blane*, 1 *Hare*, 381).

¹ *Carrell v. Cuddington*, 7 and 8 Eliz. Plowd., 295.

² *Ostern v. Carden*, 7 and 8 Eliz. Plowd., 293.

twenty years; if a stranger presents to all that happen within that time, the king, after the twenty years, should have all the presentments. And many other instances were stated, which showed that the king enjoyed, by his prerogative, a power to take things in a different way than the common course of the law disposed them. He also showed many instances where the king should not be bound by a custom by which others were bound: thus a sale of his goods in market-overt could not bind the king. And as neither the common law nor custom could restrain the king's prerogative, so should not a statute which did not mention the king in express terms. Though he might take advantage of statutes in which he was not named, as of the statute of waste, and many others; but statutes that restrain shall not affect him, as the statute of Magna Charta, c. 11, ordains that common pleas shall not follow the court, but be held in a certain place: yet in 31 Edward I., where he brought a *quare impedit* in the King's Bench, and the above provision was objected, the actions were held to lie by the king's prerogative. So the statute of limitations, 32 Henry VIII., does not bind the king. And many other instances he quoted, where the king was exempt from the restraint of statutes, because he was not mentioned in them.

From this he inferred that the statute *de donis* was not to bind the king, for that was restrictive in three points: it restrains alienation; it prevents the second husband from being tenant by the courtesy; and it diminishes the estate of the donee; and all this without any mention of the king. Again, in this case, the entail is by the equity of the act, and not by the express words of the statute; and no statute shall be taken by equity against the king, though it may against the subject. Further, the statute only restrains the donee, and not the issue; and it is only by equity of the act that the issue are restrained; and such equity shall not operate against the king. And as no præcipe lies against the king, no recovery could be suffered by him, so that he would be worse circumstanced than other tenants in tail. These were the considerations which weighed with the learned judge for dissenting from the judgment given by his brethren.

It was held by the same judge, that in the present limitation, the estate was in the king in his body natural; for

no heirs, but such as are begotten by the body natural could inherit under this limitation; but notwithstanding that, yet his body politic was so united to the body natural, that there could not be properly a distinction; but the king, as to this estate, should enjoy all the prerogatives to which he was entitled in his politic capacity. This had been laid down as the groundwork of the above argument. This was agreed by the other side; but they insisted, that in gifts of land to the king, the person was not to be considered, but only the estate in the land, and that alone was to govern. Thus a fee-simple conditional might be given to the king before the statute, and he could not alien in fee before issue had; for it would be a wrong in any other person, which was not warranted by his prerogative. And though they admitted, that in some cases the quality of things was altered in respect to the person of the king, as the descent of land to the eldest of his daughters, and some others, yet, on the contrary, in some cases; if gavelkind-land descended to him and his brother, each should have a moiety; but the king's eldest son should take the whole of his moiety. But in fees conditional, they said the estate was the same in the king as in another person. And, as to the act, supposing it to be law that the king is not to be bound by it unless named, they said he was named; for it says, *wherefore the lord the king perceiving how necessary and useful it is*, etc., by which it appears, that the king saw the mischief, and ordained the remedy; and it would not be reasonable that he should wish to be at liberty to continue the mischief himself; but he certainly meant to be bound by an ordinance, so remedial as this; and if he was not, the whole intent of the donor, in this case, would be disappointed; and the will of the donor ought now to be as a law, as well against the king as any other person. They further argued, that the king, by claiming to hold contrary to the statute, would destroy his own estate; for if he said his estate-tail was a fee-simple, so would the preceding tail be; and then his fee could not be limited on the former, but would be void; and to say the one was entail, but the other in fee, that is, to affirm the operation of the statute as to one, and not as to the other, would be a construction not to be endured; and he should be stopped by the rule, *qui sentit commodum, sentire debet et onus*: and it would also be partly destroying the

fine, upon which his own estate depended, for it would make void the remainder in fee to the right heirs of the Lord Berkeley. And they took it to be implied by the decision in 4 Henry VI.¹ and 22 Edward IV., that the king is bound by the statute the same as a common person, and expressly by 7 Henry IV., c. 2, where an estate-tail is adjudged not to be forfeitable for treason. And Anthony Brown quoted the case of his own father, whose land being seized for the king's debt, was discharged, because it was entailed; for the king was not at liberty to say, that as to him the estate should be construed a fee-simple conditional. And Lord Dyer thought it clear that the justices who took the fine thought it a fee-tail, or it would have been idle to suffer it to pass; and those were men of great learning, and were Brian, Townsend, Davers, and Vavisor.²

The distinction between the natural and politic body of the king was made a subject of consideration in the case of the duchy of Lancaster, which was considered this same year at Serjeant's Inn, by several justices, serjeants, and counsellors of that court. The question there was, whether a lease of duchy lands made by Edward VI. was not void for his nonage? This led to an inquiry into the nature of the annexation of the duchy to the crown; the history of which it set forth with great precision and clearness. After considering the establishment and alteration of the connection and separation of this great franchise from the crown by Henry IV., and lastly by Henry VII.; and though some did not agree to the exposition of the stat. Henry VII., which supposes the duchy not to be separated in inheritance and right from the crown, and not divested out of the body politic of the king, and vested in his body natural, as some of them held it to be; yet they all agreed, except Ruswell, the solicitor to the queen, that the king's person shall not be invalidated by the duchy being given to him or his heirs by that act; but he remains always of full age, as well in regard to gifts and grants of land made by him as in the administration of justice. At a subsequent argument upon this point, in the duchy court, it was agreed by all present, that King Henry VII. had the duchy in his body natural, as Henry V. had it disjoined from the

¹ 4 Hen. VI., 19.² 4 Eliz. Plowd., 241.

crown, and not as Edward IV. had it: and this was by reason of the statute of Henry VII.¹

Prerogative of
the crown as
to mines.

In the famous *case of Mines*, an important article of the royal prerogative was settled after it had been passed over by the statute *de prerogativâ regis*, and all the old treatises upon the law. This case depending in the Exchequer, was referred to the Exchequer Chamber; where, in the tenth year of the queen, it was resolved by all the justices and barons, on the authority of old grants and of long usage, that, by law, all mines of gold and silver, within the realm, belonged to the crown by prerogative, with liberty to dig and carry away the ore, and all the mirdints necessary for getting the ore: again, it was agreed by Harper, Southcote, and Weston, that if gold or silver be in ores or mines of copper, tin or other base metal, the whole of the precious and base metal belong to the subject in whose soil it is found, if the former does not exceed the value of the latter; for if it did, then the crown should have both; and it should be called a mine royal. But all the other justices and barons were of opinion, that both belonged to the crown, though the gold or silver was of less value than the base metal; and should be called a mine royal; for they said, the records made no distinction as to the value of the metals; the extent of this opinion was qualified by act of parliament in later times.²

The point which had been decided in the last reign, in *Throckmorton v. Tracy*, that a grant of reversion *habendum* for years, was a good lease of the land for years, was recognized and confirmed in *Wrottesly v. Adams*, in the beginning of this reign; and further, they adjudged, that though the declaration varied from the deed, and had stated it as a grant of a reversion, *habendum the reversion* for years, yet it was the same thing. But the principal point in this case was this, the reversion was granted for a term of years, to commence *after the end and expiration of the first term for years*; and the first termor having accepted a lease for life, which was in law a surrender of the first, it was contended, this was not such an end and expiration of it as should give commencement to the second lease for years. And the court held,

¹ Plowd., 221.

² 1 William and Mary, c. 30; and 5 William and Mary, c. 6. Plowd., 336.

that *term* was the emphatical word, and not *years*; and the term or estate might cease, though the years were not elapsed, as in the present case; and so they held the second lease should commence upon this constructive determination of the former.¹

We have seen the difficulty the courts had in pronouncing upon running leases; these were still continued in various shapes; and wherever a lessor was contented with his lessee, it was a very desirous mode of tempting each party to conduct himself to the satisfaction of the other. A lease of this sort was brought in question in 6 Elizabeth, in the case of *Say v. Smith*; a lease was made for ten years, and the lessee covenanted, at the end of the ten years, to pay 10,000 tiles, or the value of them in money, as a sum in gross; and further, the lessor covenanted, "if the lessee and his assigns would pay to the lessor and his assigns *the said 10,000 tiles*, or their value in money, at the end and term of every ten years, from thence next following, that then he and his assigns should have a perpetual demise *from ten years to ten years continually*, and ensuing out of the memory of man; at the rent of four pounds." It was the opinion of the whole Court of Common Pleas, that there was no lease beyond the first ten years for want of certainty. It was said, that this being a lease to commence on condition, that should be performed before the lease could commence. And Lord Dyer said in the case in Littleton, of a lease for years, upon condition that, if the lessee does such an act within the two first years, he should have the fee-simple; he should not have the fee till he had performed the condition, and Littleton's opinion to the contrary was not law. So here, after the first ten years, a condition is to be performed before a lease can arise; and it must be seen whether this condition can be performed at all; and they argued that it could not. For, they said, by the words of the covenant, he ought to pay the tiles every ten years following, which would be to the end of the world; again, they were to be the *said tiles*; now the same tiles could not be paid twice over, therefore, they concluded, as every ten years to the end of time must first elapse, and as the same tiles must be paid over again, these were conditions that could not be

¹ 1 Eliz. Plowd., 198.

performed: and so no lease took place after the first ten years.

As they were pleased to adjudge, for the above reasons, that this lease wanted a certain commencement, they also thought, for the following, that it wanted a certain continuance. For a demise from ten years to ten years (if it had stopped there) would have been a good demise for twenty years; but from ten years to ten years continually out of the memory of man, contains time without a term; and so does not come within the legal idea of a term for years. So they agreed in adjudging this to be no lease after the first ten years.¹

On this occasion the judges delivered their opinions upon several leases of this arbitrary kind. They said that certainty was what was absolutely required in all leases for years; and some of these running leases were good, if any certainty could be made out. Thus, a lease for ten years, and so from ten years to ten years, during one hundred years, was held good. If a lease was for three years, and so from three years to three years, during the life of *T. S.*, this, they held, to be only good for six years; for the second three years was as much as to say, from the first three years during other three years, which was certain; but afterwards it is all uncertainty; and Brown said, it had been so adjudged. Dyer said, in his memory, it had been adjudged in that court, that a lease of a parsonage for five years, and so from five years to five years during his life (which was their common way of leasing), was good for ten years, and no longer, though the lessor continued parson; because there was no certainty.²

The case of *Bracebridge v. Cooke* was where a lease
Leases.
for years was made by a man, and the lessee granted the term to the lessor's wife and a stranger, and the wife died. And it was adjudged that the stranger should have the whole by survivorship; for the joint-tenancy was not dissolved by a merger of the term in the husband's inheritance.³ And in another case, which arose from part of the same transaction, it was adjudged, where a lease is made for forty years, if the lessee lives so long, and afterwards the same land is leased to another without deed for seventy years, this is a good

¹ Plowd., 272.

² Ibid., 273.

³ Ibid., 417.

lease; for as many years as shall remain after the first term ended either by the death of the lessee, or by effluxion of time, and is but executory till the end of the first term, and not executed. And such second lease is good, though made without deed.¹

The nature of leases which were to commence or determine on a contingency was much agitated in the *Rector of Cheddington's* case, in 41 Elizabeth. There a demise was made of a rectory to Elizabeth *usus ad finem et durante termini* of eighty years, if she so long lived; and if she died, or aliened the land *infra præd. terminum* of eighty years, then her estate should cease. And the rector demised the land for as many years as were unexpired after the death or alienation of Elizabeth to Ralph, *pro et durante præd. termino* of eighty years; and in the same manner, upon the same contingency, to William; and then to Thomas, *pro et durante tot annis* of the eighty years as shall remain unexpired. Afterwards Thomas died, then William, and then Elizabeth; then Ralph entered into the land, and the question of title arose between him and an assignee claiming under the administratrix of Thomas. And it was resolved, that the lease to Ralph and William was void, because there could not be a residue of the term after her death, as it was, by express limitation, to expire by that event. But they held the demise to Thomas to be under different circumstances, because it was not *de præd. termino*, but *de præd.* eighty years. Notwithstanding this, it was argued against the demise to Thomas, which they said was void, because the lessor had only a possibility, namely, if Elizabeth died, and that was not such an interest as could be demised; but on this the court gave no opinion, but they resolved the lease to be void for the uncertainty: for it was uncertain how many years would remain at the death of Elizabeth; and, further, by Thomas's death during the life of Elizabeth the uncertainty at the commencement was not reduced to any certainty during the life of Thomas; for it depended upon a contingency precedent, and till that happened, the interest or term is not certain, nor is the land bound by it: the lease, therefore, which never took effect, cannot rest in his administrators; and supposing he had survived

¹ *Bracebridge v. Clowse*, Plowd., 420.

Elizabeth, the lease would have been void, because it was not to commence unless Ralph died before Elizabeth; but as he survived her, the lease to Thomas could never commence. (So it ought to stand; but in Coke the whole of this part of the argument is confounded and wrong, by the mistake that William and Ralph both survived Elizabeth, when by the state of the case it appears that Ralph was the only survivor.)¹ And, further, it was said by Popham (though this was no part of the decision of the court), that another reason for the lease being void was, that it could not commence upon a contingency which depended upon another contingency, as that the demise to Thomas depended on the contingency annexed to the demise made to William, and the demise to William depended upon the contingency annexed to the demise made to Ralph.² But this rule has not been admitted for law in later times.

It was an important decision that declared executors of executors should be comprehended under the description of assigns to the first testator. The case was that *A.* and his wife leased to *B.* for twenty-one years, and covenanted with *B.* and his executors that at the expiration of the term they would make another lease for the same term to the said *B. and his assigns.* *B.* dies, having made his executrix; and she dies, leaving an executor; and then the term expiring, the executor brings covenant against the lessors for a renewal. This was the case of *Chapman v. Dalton*, and it was argued in the King's Bench, with some show of reason, that the action would not lie.

It was said that the death of *B.* had rendered the covenant impossible to be performed, for the lease was to be to *him and his assigns*, which was *habendum* to him and his assigns, a limitation that could not now be made; though, perhaps, if it had been in the disjunctive (*or his assigns*), it might be performed after his death, if he had named a person in his will to whom it should be made; that is, an assignee in deed, and not one in law, as an executor is. And further it was contended that, if an executor was such an assignee, yet an executor of an executor could by no means be such; for, by the common law, they were considered as mere strangers, and not privy to the will

¹ 1 Rep., 156.

² Ibid., 153.

of the first testator, nor able to bring any actions concerning his property, which was remedied by stat. 25 Edward III., c. 5. And in addition to the above reasoning, Wray contended that, as this act gives only debt, account, and an action for goods carried away, the present action of covenant was not warranted by it. And further, he said, if the lease was made to the plaintiff, he would be a purchaser, and would not have it to the use of the first testator, as it would have been if granted to *B.*, which he thought an additional reason why the plaintiff should be barred.

On the other side it was answered that in every gift or covenant the words shall be taken most strongly against him who makes it, and most strongly for him to whom it is made, and so must the word *assigns* be construed here. If it is construed as a word of limitation, it would be a word of abundance, and merely void, for which reason another sense must be found out. And it has two senses—one where it signifies the person to whom a thing granted shall be granted by the person who has it, as a grant in a lease, that the lessee and his assigns should have such quantity of wood, means the person to whom the lessee shall assign the lease; but this is not the present case. The other sense is, where it means the person *to whom* a thing shall be done which is not yet done. As a condition to give you or your assigns a horse, their assigns are such persons as you shall appoint to receive the horse. Then, again, both these assigns are either in deed or in law those whom the party appoints, or those whom the law appoints, as executors; for they represent the person of the testator in personal things, and so are his assigns in law. So in the above case of the horse, the executor is the person to receive it, if no other is appointed. And by 27 Henry VIII. it appeared that the law was so held.

And those who say that the lease should be made to *B.* as well as to his assigns, because of the copulative *and*, they said this was one of those bad expositions that destroyed the text; for it would be the same as saying that, were *B.* alive, the lease should not be made to him solely, but to him *and his assigns*; so that his assigns must take jointly with him, and the lease could not be made till he had appointed an assignee; but this would be mere non-

sense, for then his executors must be joined with him; but instead of construing this a joint estate to *B.* and his assigns, the copulative *and* should here, as in many other instances in the law, be taken for the disjunctive *or*. And the sense is to make a lease to *B.*, if he is alive, and if not, to his assignee — namely, his executor.

The objection that the executor of an executor is not the executor to the first testator, they said, was equally ill founded; for if I give authority to my bailiff to sell my sheep, this is my sale by him. And, in like manner, when a man makes his executor, it is thereby implied that, if the executor dies, the second executor shall be executor to the first testator, for he is appointed by the first executor to whom the testator intrusted such appointment; he is, therefore, immediate executor to the first testator, and stands entirely in the place of the first. And so it was held before the stat. 25 Edward III., for that act was only made to give account and an action for goods taken; but the action of debt need not have been put in the statute, for executors of executors might have had that at common law, as appears by a case in 10 Edward II.;¹ though, as many doubted thereof, it was well to insert it in the act. Thus executors of executors might have all actions which the common law gave to the first executors, and so might have covenant; but if not, yet they now may by equity of stat. 25 Edward III.

But the reasons upon which the judges declared they rested their opinion were the following: It was said that, admitting *assigns* to be a word of limitation, and so void, or admitting it to be out of the covenant, then it is that a new lease shall be made to *B.*; and taken thus, they contended the lease should be made to the executor of the executrix. For in all agreements the chief point to be considered is the intent; and if by the act of God, or other means, it cannot be performed according to the words, yet it shall be performed as near to the intent as possible. Now, the intent here was that a new lease should be made, and to *B.*; and if *B.* was dead, then the lease was still to be made, and to whom but to those to whom it would go, if it had been made to *B.*, namely, his executors, the lease, and not the lessee, being the principal con-

¹ Fitz., Executors, 110.

sideration in the agreement. As this lease was to be made twenty-one years after the agreement, the parties must have foreseen the probability that *B.* might not be alive at the time, and so could not mean the covenant should be dissolved by his death; it can make little difference to the lessor whether he made the lease to *B.* or his executors; then it comes within the common rule that agreements and conditions shall be performed according to the intent, if the words cannot be followed. To which purpose is that case in Littleton, of a condition to make an estate in special tail to the feoffor and his wife, and the heirs of their two bodies, and the husband died before it was performed; there it was his opinion the condition would be fulfilled by making an estate to the wife for life without impeachment of waste, remainder to the issue in tail, according to the first limitation; and if both were dead, then it ought to be to the issues and the heirs of the body of the father and mother;¹ and many similar instances were put from that author, and elsewhere, on the performance of conditions in this way.

They denied what had been alleged, that the lease made to the plaintiff would not be assets, for the covenant being made to the testator, every benefit derived from the performance of it shall be possessed as the covenant; so that he shall have the lease in the same manner as he had the covenant, namely, in right of the testator.

The justices met at Serjeants' Inn to consider the judgment to be given; and they unanimously agreed that the action was maintainable: and though no solemn opinion was given by the judges, the Chief-Justice Catline said, as has already been observed, that the principal reason which satisfied them was that given in the last argument.²

A case happened some time afterwards, where an executor devised a term that he took as executor, and the law was thus laid down by all the justices of the King's Bench, namely, that the devise was void; for as soon as he is dead, it goes to the use of the first testator, and his executors have it as executors to the first testator, and to his use, and not as executors to the last testator, nor to his use. For the goods of the first testator shall not be put in execution for the debt of the last testator, and the last executors

¹ Litt., sec. 352.

² 7 Eliz. Plowd., 286.

have them by relation as immediate executors to the first testator. Yet the executor had the disposal of them in his life; but that authority ceases with his life, and is transferred to his executors, who, however, hold them, not as his executors, but as executors to the first testator; and the devise being void, the assent of the executor was void also. The Chief-Justice Wray said, he had spoken with several of the justices of the Common Pleas, and they agreed that the devise was void.¹

In the course of our historical inquiry into the changes in doctrines and opinions, there are few heads of law that have not become the subject of frequent controversy: the principles of the old common law have been frequently altered and modified, they have been varied by statute and overruled by the courts. Statutes made to remedy difficulties have become the source of new ones, and have occasioned other statutes to correct and amend them. Every rule for the government of property has, at one time or other, been disputed; every remedy for the recovery of it has been the subject of difficulty and doubt; and men's voluntary contracts for the exchange of property have furnished endless contests in our courts. Through all these changes and revolutions there is one title in our law which seems to have enjoyed a singular exemption, and that is, "the law of descent in fee-simple." The mode in which these common-law estates were to pass from ancestor to heir was settled upon principles so clear and defined, that it has seldom become the subject of judicial decisions. There are few cases of this kind in the books; and we are informed by the reporter that, in his time, he did not know two cases upon inheritances and escheats.²

One of these rare instances happened in the 15th of the queen, in the case of *Clere v. Brook*, where the law of inheritances was spoken upon very fully in order to settle the point there in dispute. The question was simply this: Clere Hadden dying without issue, whether the remainder in fee, which he had by purchase, should descend to Young, the heir of the grandmother, on the part of the father (inasmuch as he had no other heir on the part of his father, nor on the part of his grandfather on the father's side), or should descend to Clere, his uncle, and next heir on the

¹ 20 Eliz. Plowd., 525.

² Pref., 4 Rep.

part of the mother? To make this case, and some points which arise in it, clearer to the reader, I shall refer to the commentaries which are in the hands of everybody; and it will appear, in the table of descent, that the question was between No. 11 and No. 14.

Before the court came to consider the principal point in this cause, they previously agreed upon certain points, which, being once admitted, might furnish a ground on which to argue and to decide. These were nothing more than what were very well understood before, and were to be found, either in words or in effect, in some of our oldest law-books. These points were agreed by the court and the counsel on both sides, and were three in number.

The first point was, that in collateral descent from a purchaser who dies without issue, the heirs on the part of the father, who are of the blood of the male ancestors in the lineal ascent by the father, shall be preferred before the heirs who are of the blood of the females in the lineal ascent by the father, in one and the same degree. Thus the brother of the grandfather to the brother of the grandmother, that is, No. 8 to No. 11; and so the brother of the great-grandfather before the brother of the great-grandmother, that is, No. 9 to No. 10. And the same holds with regard to the brother of the great-great-grandfather, and the brother of the great-great-grandmother.

The second point was, that if the purchaser died without issue, and had no heir on the part of the father, the land should descend to the next heir on the part of the mother, which meant the heirs of the race of males from whom the mother descended, in preference to the others. Thus the brother of the grandfather of the mother of the purchaser shall inherit, in preference to the brother of the grandmother of the purchaser, that is, No. 16 to No. 17. For the brother of the grandfather (as in the former case) is more worthily descended, being of the great-grandfather's line. And in confirmation of this descent to the heir on the part of the mother, on default of heirs of the purchaser on the part of the father, they cited Littleton, sect. 4, and 49, Ass. 4, and 12 Edward IV., 14.

The third point was, that if a purchaser has issue a son, and dies, and the son enters and dies without issue, or heir on the part of his father's father, the heir on the part of his father's mother shall have the land, and for this they quoted

12 Edward IV.; but Loveless said, in such case the heir of the part of the mother of such issue could never inherit; in confirmation of which was stated at length a case from 39 Ass. 30, and the case of *Carell v. Cuddington*, which we shall have occasion to consider in another place; for he said, as long as the land continues in descent, it shall taste of the first purchaser, and to his blood only shall it have respect, and not to the blood of any woman who may be married to any of the issue. So that, in point of descent, no marriage is to be respected but that of the father and mother of the purchaser.

But the great doubt, after these points were agreed on, was, whether there was in being any heir on the part of the father of Clere Hadden. And it was contended that the plaintiff Clere was nearer in descent than Young, for the plaintiff was uncle on the part of the mother, and Young is in a remoter degree than the plaintiff and Clere; and Littleton says, that the next cousin collateral shall inherit, so that proximity of blood was to be considered. And they said, true it was that Young was descended on the part of the father, but it was on the part of a female, namely, the grandmother of the purchaser, and as much a stranger to the blood of the Haddens as the mother of the purchaser; and so, being equally strangers, it seemed reasonable to prefer the nearest. And so material did they conceive the proximity of blood to be, that they thought the law would countenance it to prevent plurality of claims.

To this it was answered, on the other side, that the plaintiff and Young not being in one degree of blood to the purchaser, proximity is not to be regarded. But the blood between the plaintiff and Clere Hadden came immediately from a female; but that between Young and him, though from a female, was derived through a male, namely, Clere Hadden's father, and, on that account, more worthy; so that Young is of the blood of the father of Clere Hadden: and Littleton says expressly, *all of the blood of the father shall inherit before they on the part of the mother*. And he showed that Bracton makes the brother of the mother of the father of the purchaser to be heir to the purchaser before the brother of the purchaser's mother, which is a decision of the very point; and of the same opinion were the whole court.

In answer to that part of the argument where it was sug-

gested that much confusion would follow if proximity of blood was not suffered to govern, it was observed by Justice Manwood that no confusion would happen if the more worthy in blood was preferred; but if they were equally worthy, then the nearest should be preferred. For if the contest was between the brother of the purchaser's father and the brother of the purchaser's grandfather, that is, No. 8 and No. 9, the former should be preferred; because, being equally worthy in blood, that is, in the lineal ascent of males, the nearest should be preferred. And for the same reason, he said, the brother of the purchaser's grandmother, that is, No. 11 before No. 10, for they are equally worthy in blood, he says (for such heirs come from the blood of the female sex from which the purchaser's father issued), and so the nearest is to be preferred. But, on the other hand, the brother of the purchaser's great-grandfather shall be preferred to the brother of the purchaser's grandmother, that is, No. 9 to No. 11, because, though less near, he is more worthy; for his blood accrues by male blood throughout; for he was son to the purchaser's great-great-grandfather, while the blood of the other only accrued by a female. And this was extending the doctrine contained in the first point resolved before, for there this preference is not carried further than where they are "in one and the same degree."

In the second of these positions, where the brother of the grandmother is preferred to the brother of the great-grandmother, that is, No. 11 to No. 10, the learned judge was not followed by some lawyers who were present at the time it was delivered; but they thought the brother of the great-grandmother should be preferred, because his blood is derived to the purchaser by two males, namely, the father and grandfather; whereas that of the other is derived only by one, and the grandfather was not of the blood of the brother of the grandmother, but of the brother of the great-grandmother, and therefore more worthy. Upon these considerations it was that Plowden, as he tells us, again put the question to Manwood, in the presence of Harper, another of the justices, and they both expressed themselves clearly in the same opinion, and said it must be so, on account of the proximity, which holds place on the part of females conjoined by marriage to males, where such blood is once derived by a male to the first purchaser.

And when, at another time, Plowden suggested the same doubt to Lord Dyer, he was of the same opinion with the other two; so that this, though no part of the cause, was agreed by all the justices of the Common Pleas.¹ This position has been examined by later writers, among whom the author of the Commentaries has given eight very cogent reasons why it should not be admitted for law, one of which is, that it establishes a doctrine incompatible with the point adjudged in this very case.² For the principal reason that governed in this decision was, that the blood of Young was conveyed to the purchaser by a male, which the blood of the mother's brother was not; so that this new idea of proximity entirely militates with that which they recognized and followed in this adjudication, the preference of the male blood, and tends to all the uniformity and coherence in the law of descents.

Another check was now given to the statute of uses by a determination at common law. It was solemnly agreed by all the judges in the Exchequer Chamber, upon a point referred to them by the chancellor, that the statute does not execute the use of a term. The case was this: *A.*, possessed of a term, granted all his estate and interest to *B.* and *C.*, and their assigns, to the use of *A.* and his wife; afterwards *A.* gave to a stranger such interest as he had in the lease; and it was held that nothing passed by such gift, there being no use executed in him.³ This was supposed to be supported by the words of the statute, which, as it only mentions such persons as were *seized* to the use of others, was held not to extend to terms for years, or other chattel interests of which the owner is not *seized*, but only *possessed*.

This was the opinion of the judges on the point, as a question of law; nor does the reporter take any notice how it was afterwards treated by the chancellor, as to the equity of the case, which might call upon him to do that which a court of law would not venture upon. However, it appears that the Court of Chancery had taken upon itself to allow relief in like instances, where the courts of common law had been over-strict in their construction of the

¹ Plowden, in the translation, is made to say, only, Dyer, Manwood, and Harper — which is not all the judges. — See the original, if Harper, another justice, is not Harper and another justice.

² Black., chap. Descent, p. 233.

³ 23 Eliz. Dyer, 369.

statute; and, under the name of *trusts*, gave efficacy to such gifts as the judges would not consider as *uses*. This seems to have prevailed to a great extent in this reign, and to have been generally admitted, and tolerably well understood by the lawyers of the time. In *Witham's* case, in Chancery, where a term for years was granted to the use of a *feme-sole*, who took a husband, and died, it was there made a question whether the husband should have the use, or the administrator of the *feme*; and it was resolved that the administrator should have it, and not the husband; because this *trust of a term* was a thing in privity, and in nature of an action, for which there was no remedy but by subpœna; and it was then said to have been so determined in a case which happened in the eighth year of this reign.¹

Indeed, the doctrine of trusts seems to have thoroughly established itself; for, in 42 and 43 Elizabeth, Of trust-terms and other trusts. in *Sir Moyle Finch's* case, we find the judges, to whom it had been referred by the queen, to reconsider the chancellor's decree, not confining themselves to the mere point of law, as formerly, but entering on a full discussion of the very matter of equity, as it was opened to the chancellor, and treating it as a system of learning which had already grown to some size. They resolved the following general rules of equity: 1st, That a disseizor was subject to no trust, nor could any subpœna be had against him, not only because he was in the *post*, but because the right of inheritance or freehold was determinable at common law, and not in Chancery; that *cestui que use*, while he had his being, had no remedy in such case. 2dly, That a trust could not be assigned, because it was a matter in privity, and in nature of a chose in action; for he had no power over the land, but a remedy only by subpœna, unlike a *cestui que use*; for he had a *possessio fratris*; might be sworn on juries; and after stat. 1 Richard III., had the disposition of the land. And it was said, if a bare trust or confidence might be assigned over, great inconvenience might ensue by granting it to great men. And to discourage endless inquiries of this kind, it was the opinion of some of the judges that if a man make a conveyance, and declare a use, the party himself, or his heirs, shall not

¹ 32 Eliz. 4 Inst., 87.

be received to aver a secret trust, unless such trust appear in writing, or otherwise be expressed by some apparent matter.

Besides these resolutions upon the nature of this new species of property, called trusts, they agreed that when any title of freehold, or other matter determinable at common law, arose incidentally in equity, it should be referred to a trial at common law, where the party may be relieved by error, attain, or an action of a higher nature; and where a suit is for evidences, there, if the defendant, in his answer, make title to the land, the plaintiff ought not to proceed; for otherwise, by such a surmise, matter of ordinary cognizance would be inquired of in equity.¹

The power of this court to determine on resulting trusts was strongly debated in 39 and 40 Elizabeth, a cause where Sir Moyle Finch was the defendant, and had pleaded a judgment in ejectment, and demanded whether he should be put to answer any surmises that invalidated a judgment recovered at law. The Lord Chancellor Egerton was of opinion that he should answer the bill. And the queen afterwards referred the consideration of the demurrer to the judges, where it was argued that the proceeding in Chancery was not to impeach the judgment, but having admitted the validity of it, to relieve upon equitable considerations arising thereon. If a man, said they, has two matters to aid him, one at law and one in equity, upon failure in his suit at law, he may, notwithstanding judgment there against him, sue to be relieved on a collateral matter in equity; and they showed many forcible precedents to this effect in the reigns of Henry VIII. and Edward VI.² But, after great consideration of the point, it was resolved by all the judges that the plea was good, and that there should be no further proceedings in equity; for though the chancellor would not (as hath been said) examine the judgment, yet he would by his decree take away the effect of it. And as to the precedents quoted from the preceding reigns, they were treated without any regard, as founded on the sole opinion of the chancellor, and passing *sub silentio*. They termed it not only an inconvenience, but directly against the laws and statutes of the realm (namely, 27 Edward III., c. 1, and 4 Henry IV., c. 22), against which no prece-

¹ 4 Inst., 85.

² Crompton, 58 b.

dent can prevail.¹ From this it is plain that the court of equity in Chancery was kept in strict subordination to the courts of law (a); and whenever it happened that they had

(a) This phraseology betrays the presence of the very fallacy which pervaded the minds of the common-law judges, who made such an ignorant and narrow-minded opposition to the exercise of the equitable jurisdiction of the Court of Chancery. Their error lay in a forgetfulness, or perhaps ignorance, of the fundamental principle that "equity follows law," that is to say, follows it out; so that it could never be opposed to law, however it might often go further than law; and the difference between it and common law was that its procedure allowed of a larger measure of justice than the contracted scope of common law would allow of. But its principles were those of common law, administered and carried out, free from the fetters in which the rules of the common law, rather imposed by its procedure than its principles, encumbered it. So manifest was this, that it must have been, with some lawyers who were jealous of the new jurisdiction of equity, rather prejudice than ignorance which prevented them from seeing it. Thus it must have been, for instance, with Lord Coke, who clearly expounds how the great principle of equity, equality, was derived from the common law, and, in some cases, actually enforced, as under the old writ *de contributione facienda* (*Harbett's Case*, 3 *Coke's Reps.*). In other cases where the procedure of common law did not carry it out, it surely was not opposed to law to allow of equity carrying it out. So, with reference to tenants in common, who, by a mere rule of the common law, were prevented from suing each other; so that at law one had no remedy against the other, though he had taken all (*Co. Litt.*, 323). It surely could not be inconsistent with law to allow in equity the remedy which the common law could not afford. Most heads of equitable jurisdiction were founded upon legal rights and legal writs. Thus the jurisdiction as to granting commissions to ascertain boundaries, deduced from the writ *de relatione mobilibus divisis*, or that *de perambulatione facienda* (*Spur v. Cawter*, 2 *Mer.*, 410). So entirely do the same principles prevail in equity and at law that there is often a concurrent or alternative remedy in a court of law and equity. Thus, for instance, the greatest masters of law and equity have deduced the right to enforce contribution in equity from the old common law writ *de contributione facienda* (*Dering v. Winchelsea*, 2 *Cox*, 318, 2 *Bos. & Pull.*). The remedy is sometimes in equity, and sometimes at law. Indeed, the only difficulty in equity often is, that there is a remedy at law. Thus, for example, an injunction against the act of commissioners of sewers, reducing the height of water in a river, dissolved, there being a much shorter remedy by *certiorari* in the Court of King's Bench who interfere with great caution (*Kerrison v. Sorrow*, 19 *Ves.*, 449). So on application to the court to set aside an *ad quod damnum*, on a suggestion of surprise upon the neighboring inhabitants when the inquisition was taken, and for want of a new road being set out (in lieu of the road taken away by the person who issued the writ) in his own ground, the chancellor held, that in cases of *ad quod damnum*, equity must judge according to the rules of law, and the inconvenience of the public in such cases is not inquirable in equity, for the jurisdiction belongs to the quarter-sessions, and it is sufficient if the inquisition is executed in a fair and open manner (*Exp. Vennor*, 3 *Atk.*, 766). Thus the principle was that equity followed law. Yet the exercise of equitable jurisdiction was regarded with jealousy in the courts of law. The reports of the reign often show this. In an action of debt at the common law, judgment being against the defendant, and day given to move in arrest thereof, he, in

¹ 4 *Inst.*, 86.

been making precedents of a new and extraordinary kind, they received a check and animadversion, which stamped everything in that court with the name of innovation and abuse, that had not received a sanction from the judges. Maxims of equity were formed, in this manner, under the control of the common law, and were rarely applied but in analogy to some pre-established course of legal redress. This was likely to continue while the present order of appeal continued. An appeal from a decree or order of the chancellor was by petition to the queen, who used to refer the consideration of it to the judges, a course of proceeding entirely conformable with the nature of this equitable jurisdiction, which, being derived originally from the king in council, was properly amenable to that tribunal in all instances of error or misconduct.

The strongest inclination was shown to maintain this opposition to the court of equity, not only by the courts, but by the legislature. The stat. 27 Elizabeth, c. 1, which, in very general words, restrains all application to other jurisdictions to impeach or impede the execution of judgments given in the king's courts, under the penalty of a præmunire, has been interpreted, as well as stat. Richard II., c. 5, not only as imposing a restraint upon popish claims of judicature, but also of the equitable jurisdiction in Chancery; and in the thirty-first

the interim, preferred his bill in Chancery, and obtained an injunction to stay judgment and execution; but notwithstanding, the court granted both, for by the statute they said (4 Hen. IV., c. xxiii.), after judgment given, the party ought to submit, and it ought not to be reversed nor awarded but by error or attain. And it was delivered for a general maxim in law, that if any court of equity doth intermeddle with any matters properly triable at the common law, they are to be prohibited, for neither writs of error nor attain can be brought to reverse the decrees made in those courts (*Heath v. Rydley, Cro. Jac.*, 335). But this, it is evident, was mere prejudice, arising from ignorance of the fundamental principle of equity that it follows law, and follows it out. In another case, where a man had obtained a bond for the price of articles sold by him with gross fraud and imposition, and had recovered upon it at law, and the party sued had afterwards, having then discovered the fraud, resorted to a court of equity for relief, and obtained a decree for disobedience, to which the other party had been committed, the court of law discharged him, and laid it down that, though the bill comprehended such matter of equity, and there was very good cause he should have been relieved if he had complained before the judgment, yet, now having suffered the judgment, he came too late to be relieved in a court of equity, and cannot now examine any pretence of equity after a judgment at common law (*Courtney v. Glanville, Cro. Jac.*, 344). And see Lord Coke's 4th Institute, title, "Of the Chancery."

and thirty-second years of this reign, a counsellor-at-law was indicted in the King's Bench on the statute of *præmunire*, for exhibiting a bill in Chancery after judgment had gone against his client in the King's Bench.¹

Under this and the like control, the Court of Chancery still continued to extend its authority, supported, in some degree, by the momentum it acquired in the time of Cardinal Wolsey. The objects of examination there had considerably increased of late; the statute of uses had given rise to *trusts*, which general term also comprehended infinitely more than had formerly come under the appellation of a use, and took in every just claim and equitable right to property which was not substantiated by an assurance, or in some legal way. The nature of conveyancing now practised contributed to increase such claims and rights. The direct conveyance by feoffment, which caused an immediate transmutation of possession, had long gone into disuse; and estates being rarely conveyed actually, transactions about them rested mostly in covenant and agreement to convey. Thus the greatest part of the landed property of the kingdom was in a manner afloat; and nothing but the authority which the Court of Chancery had to compel the *execution* of these covenants and agreements could *settle* and fix it. So that many questions of real property naturally became subjects of equitable decision, and, added to the regular increase of other matters of common inquiry there, augmented to a high degree the business, character, and consequence of this court.

The great difficulty this court labored under was, how to enforce its decrees. For as it proceeded only *in personam*, instead of giving execution of the thing demanded, it could only imprison the party who disobeyed its orders till he performed them. The primitive course of process by subpœna, attachment, and proclamation was found ineffectual; and the chancellor had lately added another writ, which was to issue upon the failure of the former. This commissioned all persons to take the party as *a rebel* and contemner of the law; a process, on that account, called a commission of rebellion. Upon this, it was held, they might proceed to breaking open houses to execute its commands.²

¹ Crompt., 57, 58.

² Ibid., 47 a b.

This used to issue as well to compel an appearance as to enforce a decree. The chancellor went still further, and took upon him to call in the process of the House of Lords, the serjeant-at-arms; and afterwards, towards the close of this reign, the *sequestration* was introduced — neither of which, however, are mentioned in Crompton's "Jurisdiction of Courts," published in 1637. The serjeant-at-arms was sent as an officer of the chancellor, specially directed to see whether the returns to the former writs were true, and whether the party really hid himself from justice; if this turned out to be the fact, then he issued a commission to certain persons to sequester his lands.

However, these two processes were not set up without some controversy with the courts of common law. It was the opinion of the judges in the latter end of this reign, that if the sequestrators were resisted, and any of them killed, it was only homicide *se defendendo* — a decision that went very far towards declaring this new-invented process illegal. The increase of suits here, and the consequent increase of the chancellor's importance in judicature, supported by these bold innovations, raised a great jealousy in the judges of the Court of King's Bench. This did not proceed to great lengths in the present reign, but in that of the successor embroiled the two courts in a long competition for precedence, control, and superiority.

Judicature of
the master of
the rolls.

As the number of suits increased, the chancellor needed assistance in deciding upon them. We have seen what liberty Cardinal Wolsey had taken of delegating judicial authority to several persons. In the time of Edward VI., Lord Southampton, then chancellor, having given himself to politics, needed the like assistance in matters of judicature, and accordingly granted a commission to the master of the rolls, and three masters, by which they, or any two of them, were empowered to hear and determine all manner of causes in Chancery in the absence of the chancellor; with a proviso that all decrees made by them should be *presented* to the chancellor, to be signed before they were enrolled. This commission made much noise at the time, as well because the masters were usually at that time civilians, as also on account of the nature of such a delegated authority. The common lawyers petitioned against it, and, it being referred to the judges, they were of opinion that it was

illegal, because granted by the chancellor alone, without the approbation of the Protector and council, they holding that he could not depute his judicial authority to any other.¹ In the same reign there was a commission, during the sickness of Lord Rich, properly warranted. This was to the master of the rolls, two judges, and five masters, of whom the master of the rolls, the judges, and two of the masters, constituted a quorum.

In this reign, during the vacancy of the seal, after the death of Sir Christopher Hatton, a commission to hear causes was made to four judges; and afterwards, by degrees, it was thought proper, as business multiplied, to enlarge it to all the judges and masters, and to make a standing general commission upon that plan, in which, it is said, the masters always made part of the quorum. But this occasional duty filled up very little of the time of the masters; they were now entirely abstracted from the business of the seal and the making of writs, and though now and then consulted in matters of judicature, had much leisure. Therefore the chancellor began, sometime in this reign, to refer to them an examination into matters depending in court, which at length became their ordinary employment. From this period also we may date the regular judicature exercise by the master of the rolls.

Before we leave this subject, it will be proper to mention stat. 5 Elizabeth, c. 18, which was made in order to remove a doubt that had been entertained whether the same authority, jurisdiction, and power resided in a lord-keeper as in a chancellor, Sir Nicholas Bacon being at that time lord-keeper. It was, therefore, enacted and declared that he hath and always had.

Terms limited in use being, after the determination of the above cases, known to be out of the power of the *cestui que use*, became a new species of limitation, in cases where it was expedient to restrain the taker of an interest from the destruction and management of his own property. It was probably a little after this that such terms began to be introduced into conveyances with that intention, for the various purposes and trusts we often see in the usual forms of settlements at this day.

Courts began to go further in favor of executory devises

¹ Hist. Chanc., 86.

than they had hitherto ventured in case of terms for years. The determination in the reign of Executory devises. Henry VIII.¹ that established gifts of chattels after an estate for life, with this qualification, *if* the taker for life did not actually dispose of it, was reconsidered, and in some degree brought back to the old notion, for in 20 Elizabeth, in *Welcken and Elkington*,² a remainder of a term for years, after a prior limitation for life, was adjudged *absolutely* good. Though even here great reliance was had on the first estate being expressed with some qualification, "to my wife, *for as many years as she shall live.*" And the court were there of opinion that an entire unqualified estate for life would have swallowed up the whole term, and the remainder-man have been without remedy. In 28 Elizabeth, in *Peacock's* case, the court were again called upon to give their opinion upon the nature of these devises; and there, where a lessee for years devised his term to one, and the heirs of his body begotten, and the devisee had issue, and aliened the term, it was held by the King's Bench that a term for years cannot be entailed.³

Covenants to stand seized had been now established by Covenants to stand seized. solemn adjudications. These instruments had been mostly applied to raise uses on occasion of marriage, though sometimes they were made merely on bargains for money.⁴ The next point to settle was the consideration upon which they might be grounded, so as the uses might be raised and effectuated according to the appointment of the deed. It had long been agreed that money, which formerly raised a use upon a bargain and sale without writing, was of course sufficient to answer the same purpose upon a deed. And it was now agreed, in 8 Elizabeth, after much investigation into the nature of this conveyance, in the case of *Sharrington and Stratton*,⁵ that the consideration of blood or marriage is sufficient to raise the use; and particularly there it was resolved that the affection of the covenantor to provide for his heirs male which he should beget, and a desire that the land should continue in the blood and name of his family, and the love which he bore to his brothers, were of that kind. But other considerations, such as long acquaintance, etc.,

¹ 36 Hen. VIII.² 4 Inst., 87.⁵ Plowd., 309.³ Plowd., 519.⁴ See *infra*.

though strong motives for liberality, are not sufficient to raise a use upon this family conveyance, which was generally in consequence or in contemplation of marriage. Thus was the nature of this conveyance at length settled, that is, such covenants as were executed and recognized by the courts of law. But covenants executory, that is, such as gave only a future estate, remained as in the last reign, when there was a direct determination against them.

The nature of uses underwent in this reign a more complete examination than they had received before. Their origin and progress, with the operation of the statute upon them, and all its consequences, were canvassed in every point of view; and this system of property settled upon principles that rendered it less vague and obscure, though much more refined, than heretofore.

Respecting the interest of the feoffees, it was resolved in *Delamere and Barnard*, in 10 Eliz., that the feoffees might enter to revest the use. Of feoffees to a use. The case was this: Robert and his wife, tenants in special tail, remainder to Robert in general tail, remainder to Simon in fee. Here Robert enfeoffed *A.*, who, before stat. 27 Henry VIII., enfeoffed *B.*, and he enfeoffed Simon, who enfeoffed *D.*; upon whom, after the death of Robert, the feoffees entered to revest the uses to the wife of Robert. Then it was determined, after great deliberation, that the entry of the feoffee was lawful; that he thereby revived the use, and the statute executed it to her in tail; and this, because the feoffment was made by the remainder-man Simon. And it was said, that it was never the intent of the makers of stat. 1 Richard III., that the particular tenant should lie at the mercy of those in remainder, who might thus disturb their rights; to prevent which, there should by law be a right in the feoffees to revive such uses by entry.¹

This point was again considered in 16 Elizabeth, in *Lord Pawlet's* case. A feoffment was made to the use of *D.*, the wife of the feoffor, for life; and if the feoffor survived, then to the use of the feoffor himself, and such person as he should happen to marry, for term of their lives, for a jointure, the remainder over in fee. The remainder-man in fee and the feoffees, with the consent and privity of the feoffor himself, joined in a feoffment to new feoffees, to

¹ Plowd., 352.

other uses, and levied a fine. The wife died, and the feoffor took another wife, and died. The second wife, with the assent of the first feoffees, entered; and it was made a question whether this entry to revive the uses was congeable. It was argued with much earnestness, and it was the opinion of Lord Dyer, that the new feoffment being made with the assent and will of the feoffor and his feoffees, no injury could be said to be done to the second wife, who was not *in esse* as to her title to claim at the time. And whereas some had argued that the feoffment by the feoffees was a mere nullity, they having no estate or interest since the statute, it was answered, that notwithstanding the statute, yet *adhuc remanet quædam scintilla juris et tituli, quasi medium quid inter utrosque, scilicet illa possibilitas futuri usus emergentis, et sic interesse, et titulus et non tantum nuda auctoritas, seu potestas remanet*. But the judges were equally divided, and the cause was adjourned into the Exchequer Chamber, when the parties came to an agreement, and there the matter rested till the famous case of *perpetuities*, in the 36 Elizabeth.

In *Chudleigh's* case, in 31 Elizabeth, called the case of *perpetuities*, this matter was again fully debated, and at length solemnly resolved, in the Exchequer Chamber, by ten judges against two, that there resided in the feoffees no right of entry to revest the uses, if they were disturbed by any of the *cestui que uses*. The case was this: Richard Chudleigh, having issue several sons, enfeoffed certain persons to the use of them and their heirs during the life of his eldest son; and after to the use of the first son of his eldest son in tail; and so on to the tenth son; the remainder to his second, third, and fourth sons in tail; remainder to the right heirs of Richard. Richard dies, and before issue born of the body of the eldest son, he is enfeoffed by the feoffees, and then has two sons: and it was a question whether the use, which was before in contingency, should vest in the said two sons, and be executed according to the statute.

The grounds upon which the two judges went who were for preserving the contingent use were principally these: That the statute was not made to eradicate uses; but, on the contrary, had advanced them, and established a safety and assurance for the *cestui que use* against his feoffees. Before the statute, the feoffees were owners of the land;

since, the *cestui que use* ; before, the possession governed the use ; since, the use ruled the possession. There is nothing, said they, in the preamble of the act that condemns uses ; but it speaks of extirpating subtil practised feoffments, fines, and recoveries ; which was to be effected, not by destroying uses, but by divesting the estate out of the feoffees, conusees, and recoverers, and vesting it in *cestui que use* ; and to say, that *scintilla juris* remains in the feoffees is against the very meaning of the statute. As the statute says seized, or *at any time seized*, the seisin of the feoffees at first would be sufficient to serve all the uses, as well future, when they come in possession, as the present : for there needs not a continued seisin, but a *seisin at any time* ; therefore, the first seisin, by which the fee is given to the feoffees by the feoffment, would serve all the uses, and nothing afterwards remained in the feoffees. So that the whole estate vests first in those who have the present use *in esse* ; and when the future uses come *in esse*, then they shall come in between the other estates which were before conjoined. The disturbance, in this case, is not to the first seisin, but to the seisins that arose to the *cestui que use* by the statute. The first seisin cannot be divested, but still remains, to which the future uses have relation ; and so there is both a seisin and a use : and the contingent uses are in abeyance and preservation of law till they come *in esse*.

To this it was answered, and agreed to by one or other of the judges on the other side, that the feoffment made by the feoffees, who had an estate for life by the limitation of the use, divested all the estates and future uses, notwithstanding the eldest son had notice ; for the new estate cannot be subject to the ancient use. These estates must be subject to the rules of law ; and the law says, that the remainder-man must take the land when the particular estate determines, or else it becomes void. And as by the feoffment of the tenant for life he forfeited his estate, and those in remainder were not *in esse* to take, therefore these remainders by this matter *ex post facto* were destroyed. They agreed to the case of *Lord Pawlet*. They said, by the statute no use is executed but those *in esse* ; there should be a person seized, and a person to take the use : and if the person or the use are not *in esse*, but only as it were in a possibility to have a use, there can be no execution of the

possession to the use; as before the statute such a feoffment would have divested all the uses, present and future, till the estate, out of which they were to arise, was recontinued. So, since the statute, no use can be executed unless there be seisin in some person subject to the use. By the statute, none are to be executed but uses *in esse*, in possession, reversion, or remainder; for it says, such *cestui que use* shall be adjudged in lawful possession, which cannot be said of a person not *in esse*, who hath but a possibility, which may never happen. So that no estate is by the words of the statute divested out of the feoffees, but where it can be executed in the *cestui que use*; and as a person not *in esse* cannot have a use, so neither can he have the possession by the act.

They held, that the feoffees, since the statute, had a possibility, as it were, to serve the future uses when they came *in esse*, if the possession be not disturbed by disseisin, or otherwise; and if they are disturbed, that they have power to enter to revive the future uses according to the trust reposed in them: but if by any act they bar themselves of their entry, that is a case which is not remedied by the statute, and remains as it was at common law. And in this case it was agreed by all of them, that by the alienation of the estate out of which the seisin was to have arisen, and by the destruction of the particular estate out of which the contingent remainder depended, the use was entirely gone.

These were the grounds upon which both sides founded their opinions, and judgment was given against the contingent use. The judges came also to some resolutions upon the nature of uses in general: it was held, that the statute should not be construed by equity to preserve *contingent* uses, which would lead to some of the mischiefs meant to be remedied by that act. It was wrong, they said, to imagine that uses could be limited in a manner different from estates at common law; that in truth there was no difference at this day between estates conveyed in use and conveyed in possession; for the estate and limitation of a use ought to be known, and governed by the rules of the common law, and not construed so as to maintain an uninterrupted perpetuity, which would follow from the opinions of those who endeavored to support this contingent use. The consideration of perpetuities alone, it

was said, would have been a good argument of expediency in this question, and would have no small weight in the decision, could it not have been made on sound principles of law. The consequences of perpetuities were recounted by the judges, and reprobated with much force.¹ This is the substance of this famous case of perpetuities, in the account of which it was thought proper to be thus minute, as it became a leading one upon the doctrine of uses and contingencies.

Notwithstanding perpetuities were so inveighed against in this case, a curious point was decided by the judges of the Common Pleas in 13 Elizabeth, Scholastica's case. by which it was established as law, that a tenant in tail might be restrained for alienation by the original donations: this was in the famous cause of *Newis et uxor v. Lash and Hunt*, or what is more familiarly known by the name of *Scholastica's case*. A person devised land to his eldest son in tail, with remainder to his next son, remainder to Scholastica, his daughter, with several remainders over to others of his own name; and then he subjoins a clause to this effect: "That if any of the parties should alien, sell, pledge, mortgage, entangle, encumber, or dismember the lands, he and his heirs should be excluded from the benefit of the will, and the land should immediately descend and come to the person next in tail, the same if such disorderous person had not been mentioned in the will." After the death of the testator, the two sons joined in a covenant to levy a fine and suffer a recovery, which was accordingly done; and then after the death of the eldest son, Scholastica and the plaintiff, her husband, entered by virtue of the clause of forfeiture, and then bringing an assize, the above facts were given in evidence; and being demurred to, and argued in court, the justices were all of opinion in favor of the clause of forfeiture.

The great doubt had been, whether it should be construed as a *condition* or a *limitation*, and how it stood with the law, and who should defeat the entails, and by what means. And they all agreed it was not a condition; for if it should, then the heir should enter and defeat all the estates: but here it was far from the devisor's intent that all the estates should be defeated; for his intent was, that

¹ 1 Rep., 120-140.

if any attempt was made to defeat them, the land should go to the next in tail. And to this purpose Harper and Dyer quoted a case in 29 Ass. 17, where land was given to one for life, and that he should be a chaplain, and sing for his soul; with remainder to the commonalty of the town to find a chaplain perpetual. The devisee entered, but being no chaplain, the heir of the testator ousted him: and it was held by the court that this was no condition for breach whereof the heir might enter; because it would defeat the remainder, and so disappoint the intention of the testator, who meant to have a chaplain perpetual: so they concluded, that words in a will seemingly tending to a condition shall not be so construed, when it appears the testator did not mean that all the estates should be disappointed. Besides, in this case, the eldest son took an estate, and it was meant he should be restrained; but if this was a condition, he only could enter, and when he made a feoffment, that power should go with the feoffment, so that no one would be left who had power to enter. They therefore held clearly that it was not a condition.

The next inquiry was, whether it was a limitation of estate; and, if so, whether entry was necessary before it could be determined; and then, whether the next in remainder was privy enough to enter. For Lord Dyer said, if a gift was made in tail, upon condition, that if the donee does such an act, the estate should cease, that *Frowicke* held in 20 Henry VII., the estate should not cease before entry, because it is an estate of inheritance, which should not cease by parole without an entry in fact; but otherwise of an estate for life, for that might pass in some cases by parole, as by surrender, and, therefore, might be determined by parole.

And they all agreed it should be held a limitation, that is, a devise to the party *until* he does the acts there forbid, so that when he had done any of them, it should end, as if he died without issue. As where land is given in tail, as long as *T. S.* has issue, when that issue ceased, the land is cast upon the donor without entry. If the words, therefore, were not aptly put, yet, as they amount to a limitation, they shall be taken as such, especially in a will where the intent is to be made out, and pursued as well as possible. For, as Dyer said, a man's will is as an act of parlia-

ment, so that the law submits to the matter, order, and form limited therein, and requires it to be observed. As the will directs the estate should, so the law will order it. Dyer said it was like an action *causâ matrimonii prælocuti*, where the estate should be defeated by intent, without an express condition in deed. Again, where land was given to husband and wife during the coverture, or as long as such person is abbot of such a place, these are times of limitation, and the estates would end where the event there mentioned had happened.

In support of their determination, Dyer mentioned a conveyance which he had seen made by Fitzjames, chief-justice of the King's Bench, in 28 Henry VIII., to his wife, whereby she had an estate for life with remainder over, upon condition that if she should make a discontinuance of other lands, which were assured to her, then her estate should cease, and he in remainder enter. Dyer said, it was to be presumed, that he, being chief-justice, made this estate with the assent of his brother justices, and that they understood it to be a limitation, and not a condition. And that if it was so in that instance, which was by deed, he thought, *à fortiori*, it was good when by will. And so they all agreed that it was a good limitation to determine the estate, and that Scholastica's entry was lawful.¹

In 36 Elizabeth, in *Bateman v. Allen*, another action was brought upon the clause of limitation in this will; for the present plaintiffs levied a fine, and Scholastica's next sister made a lease, and an ejectment was brought, but judgment was there given upon another point, without entering at all on the matter in law.² So ill-founded is the assertion of Lord Coke, that an opinion was then delivered by the chief-justice and two others, contrary to the resolution in *Scholastica's* case.³ It is true that he might discover by the roll the judgment was given against the parties claiming under the limitation; and so it appears by the report in Coke, who expressly says, that judgment was given without any regard to the point of law. However, it seems that the judges had now begun to entertain a different opinion of these provisos to cease estates; for in 37 Elizabeth, in the case of *Germyn v. Arscot*,

¹ Plowd., 408.² *Bateman v. Allen*, Cro. Eliz., 437.³ 10 Rep., 42.

it was held by the whole Court of Common Pleas, that such proviso was repugnant and void; and this was after open argument in court, and a conference with the other judges.¹ In the following year, the proviso in *Scholastica's* case was again brought in question, in the Court of King's Bench, to try the point, which was avoided in *Bateman v. Allen*, and which, since the late change in opinions, it was thought would be adjudged in a different manner from the first decision in *Scholastica's* case. This was in *Sharlington v. Minors*, when it was held by Fenner, Gawdy, and Clench, that the proviso was good and the entry lawful, according to the judgment in *Plowden*. But Chief-Justice Popham, relying upon the case of *Germyn v. Arscot*, said, that notwithstanding the indulgence to be given to wills, this was an impossible limitation, for if the estate was to cease, as if it had never been made, then he would be a trespasser *ab initio*; therefore, the construction should be, only to cease from the time of the alienation, and if so, it could not cease till the alienation was complete, and then the entail would be discontinued, and that discontinuance should be purged by a formedon, stating the special matter, and so the discontinuance might be avoided, but the entry could not be congeable.² These were the reasons of the chief-justice, which seemed to be applied more to the mode of availing one's self of the proviso, than to the proviso itself.

A similar proviso was brought in question in the Court of Common Pleas, in *Cholmley v. Humble*, much about this time, and it was adjudged to be void for three reasons, the principal of which were: first, because it was repugnant to say the estate should cease, as if the tenant in tail was dead, for his estate could not cease by that event, but only by the event of dying without issue; secondly, the estate could not cease by levying the fine, for then there was no estate in being.³

A point on the law of forfeiture was settled in the case of *Hales v. Petit*, which was occasioned by the unhappy end of a learned judge whom we have mentioned several times in this history. Sir James Hales had endeavored to resist the illegal proceedings of Mary with the same firmness as he had opposed in the former reign the unlawful attempt to exclude her from the throne; but this merit

¹ Moore, 364.² Ibid., 544.³ Ibid., 592.

could not protect a refractory Protestant: he was committed to custody, and treated with great severity, till he was deserted by the constancy of mind he had before discovered, and, in a fit of frenzy, drowned himself. He and his lady were joint purchasers of a lease for years, and the widow was now obliged, in a Protestant reign, to contend with a grantee of the crown, if she could establish her right of survivorship before the right of forfeiture. But the Court of Common Pleas, after some argument upon the nature of the felonious act, resolved that the forfeiture of the goods and chattels, real and personal, should in this case have relation to the act done in the lifetime of the deceased, namely, his throwing himself in the water; and then, notwithstanding the wife, before any office found, be adjudged in the term by survivor, yet after the office, the term should be adjudged in the crown; for the office, said they, has relation prior to her title of survivor, for it refers to the act done, which was equivalent to a grant by deed in his lifetime to the king. Weston went further, and said, though the forfeiture should have relation only to the death, at which time the title of the wife accrued, yet, in this concurrence of titles, that of the king should be preferred. For so, he said, it would be if a woman took husband, and had issue, and land descended to her, and the husband entered so as to be entitled to the courtesy, and afterwards the wife is found an idiot, the king shall have the land, and not the husband by the courtesy; for the husband was entitled by the first possession of the wife, and the title of the king shall have relation to the first possession of the wife, in which case the king shall be preferred.¹

Between the argument and the decision of the above cause, and the writ of error brought, another question of forfeiture was litigated in the Court of Common Pleas. Lord Lovel had made a lease for life, with condition, that if he died without issue, then the lessee should have the fee. The lessor was attainted of treason by stat. 1 Henry VII., by which all his lands were forfeited, with a saving of all rights, titles, actions, and interest of strangers. Afterwards he died without issue; an inquisition of office was found; and it was now a point of law in the case of

¹ Some doubt of this piece of law. 4 and 5 Eliz.; Plowd., 263.

Nichols v. Nichols, whether the grantee of the crown was entitled in preference to him who claimed under the condition.

The first consideration seemed to be, whether the fee was out of the lessor immediately and before the condition was performed. And it was agreed by the counsel on both sides, and by all the justices, except Lord Dyer, that the fee did not pass till he died without issue, for the condition was precedent; and by the word *then* he showed that it was not to take place till the condition had been performed. Thus, if it is agreed that upon paying £10, then the person paying shall have a lease, it was held in *Wheeler's case*¹ that the lease should not commence till the payment: the same in *Plessington's case*,² and several others. But Lord Dyer cited a case which, he said, was in Frowicke's reading, of a lease for years to an alien, upon condition to have the fee on paying a sum of money; the king makes him a denizen, and then he pays the money, and, upon office found, Frowicke held, the king should have the fee. To which case none assented; and the learning of conditions precedent had been so often settled to the contrary of late, that the opinion of the chief-justice seems quite unwarranted.

After some debate how the lessee should take his fee-simple, whether as a reversion or grant, they at length concluded he should take it as an enlargement of his first estate, which was merged in it. When these points were agreed, the other doubts arose upon the act of attainder; and then it was argued, whether that prevented the estate vesting in the lessee on performing the condition.

It was argued, that the condition could not have any effect if the privity of estate was dissolved by the lessee aliening, for his grantee could not avail himself of it; and they said it was the same if the lessor conveyed away his reversion, which is really done; for the act of attainder, by the word "*forfeit*," has given it to the king in possession. And they endeavored to show that the condition was not within the words of saving in the act; but, supposing it was, the fee-simple, when vested in the king, could not be divested out of him and given to the lessee, without *monstrans de droit*, or petition, for land cannot

¹ 14 Hen. VIII.

² 6 Rich. II.

be taken out of the king, any more than given to him, but by matter of record. And as it could not vest in the lessee immediately, it was one of those cases where it should never vest, though a petition or *monstrans de droit* were sued. So it would have stood without the office; but that has so confirmed the seisin of the queen, that the lessee's claim to the fee is utterly destroyed. And of this opinion was Manwood, justice, who thought the fee vested in the king by the word "*forfeit*," and that the condition was not within either of the words in the saving.

But all the other justices were of a contrary opinion; and, first of all, they pronounced the office to be ill pleaded and informal, and so, as it had no effect, they considered the case as if none had been found. And all, except Manwood, held that the word "*forfeit*" did not vest the reversion in the king; for it only gave a right which he had by law before, and the king's title could not be made appear but by record; so an office must always be found to show the land in certain; and for this reason it was that stat. 33 Henry VIII., c. 20, was made, that, in case of treason, the king should be in actual and real seisin, without office or inquisition; but this happening before that act is not remedied by it. The justices spoke to the other points that had been made, and they held that no privity was necessary on the part of the lessor; but that the condition was an agreement real, with which the land was charged into whatever hands it came; in proof of which they relied on *Plessington's* case,¹ and so they all held but Manwood. And Harper argued that the saving in the act was not necessary to preserve the condition to the lessee, for the act was merely a conveyance to the king, and could not be meant to do wrong to an innocent person; for if the pawnor of a jewel is attainted, the king cannot claim without paying the money for it. And Lord Dyer thought if the saving was necessary, the word *interest* would have saved the condition; but Harper thought it was not saved by that or any of the other words. It was held by most of them, that, supposing the word "*forfeit*" conveyed the possession in deed to the king, the lessee must have been driven to his petition of *monstrans de droit*. But some of them were of opinion, that though by relation

¹ 6 Rich. II. Fitz. Quid. Juris., 20.

of the office (if properly found) the fee would be in the king from the commencement of the parliament when the lessor was attainted, yet it was chargeable with the condition, and, when that was performed, should be immediately divested, without petition or *monstrans de droit*; for if it could not vest presently, they agreed with those who said it could not vest at all; but they thought the conclusion should be the contrary to that they had drawn; and they said, it was no uncommon thing for land to be divested out of the king without those formalities, as in case of remitter.

At length the court gave judgment against the grantee of the crown, upon the ground of the condition being good, and having been performed.¹

In the case of *Alton Woods* we have both a question of forfeiture and a grant of the king. There the case was shortly this: A person conveyed by fine to the king in tail, and afterwards the heir of the conusor being attainted of treason, the reversion came to the king, who makes a grant in tail; after this an act was passed in 28 Henry VIII., ordaining that the land should be adjudged in the king in fee-simple; the said fine, or any other thing, to the contrary notwithstanding, with a saving of the rights of all persons, except that of the conusor and his heirs. This case was argued in the Court of the Exchequer, where the counsel for the crown (Coke being then attorney-general) made two points: first, that the grant was void; secondly, admitting it to be good, that stat. 28 Henry VIII. had given it the king again. In support of the first point, it was said that the king's intent was to grant an estate-tail; which he could not by law do, having himself only an estate-tail; and because his grant cannot take effect according to his intent expressed in his grant, the grant is void, and shall not be construed to pass any other estate than he intended to grant. On the other side, two objections were made by way of rules to govern the construction of the king's grants: one was, that the grant shall enure as it lawfully may, and so shall be good to the grantee in possession during the king's life, and then a good grant of the reversion in tail, for in such manner the king might grant. The other was, that grants *ex gratiâ speciali, certâ*

¹ Plowd., 481.

scientiâ et vero motu, imply that the king took knowledge of his estate, and such grants shall be construed as strongly against him as those of common persons. To this it was answered, that it would be a violent construction to make this grant inure by such fractions of estates; namely, to the grantee in tail during the king's life, which would be only an estate *pur autre vie*, with a reversion in tail in the king, and then to grant his reversion to the grantee in tail, upon which the king would have a reversion in fee-expectant: all which was wholly contrary to the king's intent. And as to the two rules above laid down, they said there was another, namely, "that where the king was deceived in his grant the grant was void;" and the other two were true, and should be observed, with an exception that they did not contravene this important one. As to the second point, they said the land was expressly given to the king by the act of parliament; and the saving could never be construed to protect the right of the person possessed of the land so given, for that would be repugnant and destructive of the very design of the act.

To this reasoning the court did not assent; but Periam the chief-baron, and Ewens, against Clerk, were of opinion, as to the first point, that the grant being *ex certâ scientiâ*, etc., was to be taken as strongly as against a common person being tenant in tail, with a reversion expectant, in which case the estate would be derived out of both the estates, and none should avoid it but the issue in tail; and as to the second point, they held, that as before the stat. 28 Henry VIII. the grant was voidable by the issue, it was now unavoidable, for by the act the estate-tail was utterly extinct and barred forever.

Upon this judgment a writ of error was brought, and after some arguments at Serjeants' Inn, an opinion was delivered by the two chief-justices, and Sir Thomas Gawdy in the Exchequer Chamber, contrary to the judgment in the Exchequer, and the reasons they went upon were much the same as those already urged by the attorney-general; and in this they were confirmed by the lord-keeper Egerton and the lord treasurer, who both delivered their arguments in court¹ to the same effect.

¹ 1 Rep., 40.

★ The establishment of an action of *assumpsit* upon firm and legal grounds as a substitute for *debt* in cases of simple contract, was an event of great consequence in the course of remedial proceeding. This action had been used many years back, but had always passed *sub silentio* without being debated at all in court. But of late the validity of it had been agitated, with some difference of opinion; the Court of Common Pleas had held that this action was not maintainable, the Court of King's Bench that it was. It was argued by those who held the former opinion, that the wager of law which was only allowed in debt would be taken away by introducing this action of *assumpsit*, and the confidence between men to which the old notion of law-wager paid great regard be forever destroyed; while those of the contrary opinion thought that plea was objectionable in its very nature, and that it was full time to put defendants to some other proof of their payments than a discharge vouched only by a man's single oath, and so bring the trial of a demand from the oath of the party and his compurgators to the verdict of a jury (a).

At length, in 44 Elizabeth in *Slade's case*, the point was argued before all the judges, and it was resolved by them

(a) According to Lord Coke, it was the growth of perjury in this reign which led to this most remarkable result, and one which affords a singular illustration of the powerful operations of causes, apparently very remote, upon the changes observed in our legal history, for it led to the establishment of a new form of action (founded by a mere fiction of law upon the supposition of implied promises) to supersede the action of debt to which wager of law was incident. Wager of law (which had arisen out of the ancient Saxon system of compurgators) had come in fact to this, that the defendant denied the debt on oath, and so was allowed to go quit. It was found in this reign that this practice had led to great perjury, and hence the new action was invented in order to get rid of it; and it was pretended that wherever men were indebted, they impliedly promised to pay, and so could be sued upon such implied promise, a monstrous fiction, and one extremely characteristic of the pedantic, subtle, sophistical spirit of the age. Instead of a plain direct alteration of the law, they preferred to invent a fiction to evade it. The reason given for the change was, "that now experience proves that men's consciences grow so large that the respect of their private advantage rather induces men to perjury" (*Slade's Case*, 4 *Coke's Reps.*, 74). And Lord Coke observes, "I am surprised that in these days so little consideration is made of an oath" (*Ibid.*). It is possible that the cause might be found in those cruel and oppressive penal laws which had now become part of the policy of the age. And, as in former reigns, they had been directed alternately against Catholics or Protestants, so now they were directed against men of both religions, and, no doubt, tended to tempt men to perjury, or those habits of concealment and deception which lead to it.

that the action was maintainable;¹ and to settle the question upon principle they came to several resolutions: First, they resolved that although an action of debt lies upon the contract, yet the bargainer may have an action upon the case, or of debt, at his election; which was authorized by precedents so far back as the reign of Henry VIII., Henry VII., and Henry VI., where the declarations were, that the defendants in consideration of a sale to them of certain goods *promised* to pay so much money. They resolved again, that every contract executory imports in itself an *assumpsit*; for when any one *agrees* to pay money, or to deliver anything, thereby he *assumes* or *promises* to pay or deliver it. Therefore, when one sells goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, in that case both parties may have an action of debt, or an action upon the case, on *assumpsit*; for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case as well as of debt.

They also resolved that the plaintiff in this action shall not only recover damages for the special loss, if any, but also for the whole debt; so that a recovery in this action would be a good bar in an action of debt upon the same contract, and so *vice versâ*, as had been long before determined.² And they resolved that an action upon the case is as well a formed action, and contained in the register as an action of debt.

The solemn determination of this question confirmed the practice of bringing *assumpsit* in all matters of contract. The action of debt being consigned only to instances where the wager of law did not lie, as when it was grounded on a specialty on an act of parliament which took it away, for rent and the like. In order to accommodate it to all the various instances in which it was applied, new forms of declarations were devised; that in the present case alleged, that in consideration that the plaintiff, at the special instance and request of the defendant, had sold to the defendant such and such grain (naming it), the defendant *assumed*, and faithfully promised that he would well and truly pay so much money. This was

¹ 4 Rep., 93.

² 12 Edw. IV., c. 13. 2 Rich. III., c. 14.

drawn with a retrospect to an actual promise. Soon afterwards was formed the *indebitatus assumpsit*, where the declaration suggests that the defendant was indebted to the plaintiff in so much money, and being so *indebited*, he *assumed* (or promised) to pay. Upon the trial of which action, if a debt was proved to be due, the law, according to the above resolution, would *raise a promise*, and thereby satisfy the whole of the declaration. The same of other forms, all founded upon this postulate; as *quantum meruit*, *insimul computasset*, and the like, all which were inventions of a later date, being indeed framed from precedents then in use for actions of debt, which were adopted in this action by suggesting a *promise*.

However, these being all cases of buying and selling, the supposition of a promise was generally nothing more than was really the fact at the time of the bargain, or, at least the considering the agreement as a promise to pay was easy and consistent. But when the idea of a *promise* was suggested merely to comply with the form of the action, and was not absolutely necessary to be proved on the trial, provided a debt was made out, it was seen that other duties and demands might be claimed in an action of this kind, where it was evident that no actual promise had ever been made; but the law was trusted to for implying one, where there was proved to be a duty incumbent on the defendant to have made one. These actions, *upon promises merely implied*, were of a very liberal conception, and were calculated so as to apply themselves almost to all purposes of redress. The nature of these led into much debate upon *considerations* to raise such implied promises, that is, whether the defendant had received a reasonable purchase or motive to make the promise suggested, and to entitle the plaintiff to call upon the law to substantiate and give effect to it.

We have before seen what was the course of the King's Bench in the reign of Henry VII., in entertaining suits against defendants by bill (a); though

Actions by bill in
King's Bench.

(a) That is a bill of Middlesex, as it was called, because the Court of King's Bench sat at Westminster in Middlesex, and it was supposed that it had no proper original jurisdiction except in the county where it sat; an erroneous notion arising out of the clause in Magna Charta that common suits between party and party should not follow the king's person, as the Court of King's Bench continued to do some time after the charter, sitting in the county where the king happened to be, and in fact sitting in his court, the very

they had then so far got over the scruples of their predecessors as to be contented with *evidence only* of a person's being in custody as sufficient to give jurisdiction to the court; yet they expected, as indispensably requisite, that it should appear he was once in custody by the record of bail. To procure this requisite it was that they contrived about that time the process of bill of Middlesex and *latitat*; which, bringing the party into court on a suggestion of trespass, after bail was taken, and so an evidence of their custody was on record, they could proceed regularly, as against a person in custody of the marshal, according to the ancient practice of the court.

These were the notions while they adhered to that primitive requisite of custody which introduced this process, but the opinion on this subject was now totally changed. A more advanced state of learning had enlightened the present age, and taught them that fictions of law, as they are contrived for the purpose of attaining the ends of justice, are to be encouraged by every fair and reasonable intendment. It was in this spirit that they now argued on the proceeding by bill. As the court had taken upon it to fashion this proceeding originally to

style and title of the court being to this day *Coram Rege*, before the king himself. So long as this was so, the court could not directly entertain suits between party and party, neither could the exchequer for the same reason. And they only contrived to do so by means of fictions; that of the King's Bench being, that the party sued had committed a trespass with violence within the verge or precincts of the king's court, and was in custody for it; that of the exchequer being, that the suitor was the king's debtor and entitled to crown process to recover in a debt from the defendant. But so soon as this state of things ceased, and those courts became fixed at Westminster, as the clause in Magna Charta no longer applied, they were as entitled as the Common Pleas to entertain suits between party and party. The fictions therefore became no longer really necessary, but were retained nevertheless, notwithstanding, or perhaps it should be said because, they multiplied forms and so multiplied fees. Another erroneous notion, the source of much useless fiction, was the notion that there was a necessity for some original writ, or some writ in the nature of an original writ, to commence a suit between party and party. In the Court of Common Pleas, the court first erected for such suits, the original writ was to be sued out of Chancery and directed to the sheriff, commanding him to cause the party to be summoned to appear. In the King's Bench, however, the bill of Middlesex was allowed to be in the nature of an original, the party sued being supposed to be in custody of the court, so that no further process was necessary to bring him in within the jurisdiction by causing him to appear, appearance being personal. And as to the exchequer, there was the fictitious writ of *que minus*, pretending that the plaintiff, by reason of the debt due to him not being paid, was less able to pay the crown.

accommodate it to the ends of justice, they thought they might carry this discretionary control still further. From the primary requisite of actual custody, they had already so far deviated as to be contented with the *evidence* only of custody; and there was every reason for dispensing with this formal evidence, and supposing a defendant in custody of course. This had now become the practice of the court; and bills were filed against persons as in custody of the marshal who never were, nor were ever intended to be there. Every man in the kingdom was considered in the custody of the marshal, for the particular purpose of answering to a bill filed against him in the King's Bench; and there no longer remained any difference between a proceeding by original and by bill, excepting this fiction.

When the proceeding by bill was regarded in this light, the legal considerations respecting it were a little changed. As the precept of bill of Middlesex and *latitat* were no longer necessary in order to effect an *actual* custody, and so to found the jurisdiction of the court, the original bill, resuming its primary design, was considered itself as the ground of the court's jurisdiction. For, as in the first state of this proceeding, it was the commencement of an action against a real prisoner, so now, when every one was *supposed* a prisoner, it became the warrant to the court in the nature of an original writ; and the bill of Middlesex and *latitat* issued upon it as process to bring the party in to answer to the bill filed.

Thus the bill, as formerly, still gave jurisdiction to the court, upon which was grounded the process to bring the defendant in; in the same manner as the original warrants the process issued thereupon.

The settling the proceeding by bill, upon this broad foundation, put the King's Bench in possession of a more extended jurisdiction in civil matters. This court hereafter advanced, by very quick steps, to a participation of business with the bench, and became more considered every day as a tribunal for common pleas.

Notwithstanding that actions by bill were modelled in this liberal way, when against persons out of custody, yet the old method was preserved when a defendant was in custody: for all persons in the marshal's custody were brought into court to have the bill or declaration delivered

to them; and such as were in the custody of sheriffs, or other officers, were first to be transferred to the custody of the marshal before they could be declared against.

The ancient method of proceeding by original writ underwent some mutation, from the change of circumstances and times (a). The practice of

Actions by
original.

(a) As already seen, suits between party and party were originally supposed to require some writ to ground the jurisdiction, distinct from the process to the party to bring him in. In the real actions in the Common Pleas, for example, the original writs went to the sheriff, directing him to summon the defendant; and he accordingly returned thereupon that he *had* summoned the defendant, which return was entered of record; and of course the defendant could not controvert it in the action, if he appeared, and if he did not appear, the plaintiff, upon such return, could proceed to declare (*Bingham's Case*, 2 *Coke's Reps.*, 88). In other actions in the other courts, as ejectment, which might lie in the Queen's Bench, as being an action of trespass, the proceeding would be by bill of complaint—i. e., against a party stated and supposed to be already in actual custody—so that the process thereupon to the defendant would not be mentioned on the record, and the defendant would thereupon next appear by attorney and plead, that is, to the bill; whence arose the practice, remaining to this day, of there being no declaration in ejectment other than the bill or writ (*Ibid.*, 82). So in the next reign the plaintiff (alleged to be debtor to the queen) brought his bill of trespass and ejectment, and his bill of complaint against the defendant, supposed and stated to be present in court by his attorney; and the process to cause him to appear, *venire facias*, having already been issued and served in the same way as summons on an original writ (*Pelham's Case*, 1 *Coke's Reps.*, 3). Thus the process of all the courts implied the necessity for personal appearance, or presence in court, either in person or by attorney, in order to commence the suit. The practice of the courts had greatly altered the process, upon the general principle that whatever was proper process to bring the party sued into court, was the commencement of the action. Thus, in the Court of Common Pleas, if the plaintiff sued by original writ, there ought to have been first an original writ and a *capias* in the proper county, and then a *testatum capias* into the county where he lived, which was a dilatory procedure; and, moreover, on an original writ out of Chancery there was a heavy fee. To spare expense, therefore, and save time, the courts allowed other and shorter process, founded on a *supposed* original writ, which, in point of fact, was not issued unless there was a demurrer, on which all the proceedings must appear upon the record; and the want of an original writ would be ground for a writ of error. These writs, however, were not really necessary for the purpose of jurisdiction, as courts of sovereign jurisdiction. The only use of an original writ was to direct the sheriff to summon the party sued, and the importance of that was, that properly the defendant was not liable to process of arrest until he had committed default in not appearing upon such summons. For the object of arrest was to compel appearance, and if a party appeared without arrest, process of arrest was not called for, since it was the statutable substitute for the process of attachment of goods used at common law to enforce appearance. For this reason, however, the original writ was discontinued, and the first process really issued was the *capias*, or process of arrest. So, for the same reason, the bill in Middlesex, as it was called in the original, in that court, was never really filed, and the *latitat* was the first process really issued (*Dyer*, 118;

the sheriff to take pledges of prosecuting before he executed the original had long ceased; and it had become

Cro. Car., 259; 1 *Kel.*, 598). The writ of *latitat*, indeed, was more ancient, but it was in this respect substantially similar in nature (*Kensey v. Heywood*, 2 *Lord Raym.*, 881; *Brown v. Babbington*, *ibid.*). The statute, it was said, only applied to the want of an original *after verdict*, leaving the law as it was before upon a judgment by default, and upon error such a judgment could still be reversed for want of an original writ. Yet in practice no such writ was issued, as it went only to the sheriff, and upon it he issued some process of summons to the party, which was all that was material, and an original writ was, if necessary, sued out afterwards, but if it was not sued out in time, error would lie for the want of it (*Dismo v. Shirley*, *Yelv.*, 108). Moreover, it was said there was a difference between a bad original and no original, and that, by the terms of the statute, only the want of an original was aided, not a bad one (*Harrison v. Falstau*, *ibid.*, 109). Yet the original could be supplied even after verdict, before the record removed (*Saunders v. Cottingham*, *ibid.*, 166). The process really issued was summons, or *capias* (*Tuthill v. Milton*, *ibid.*, 158), and process whereon to ground *testatum* was returnable of course (*Palmer v. Price*, 2 *Salk.*, 589). The true commencement of the action, it was considered, was the process which brought the defendant in; and as, by the course of the Common Pleas, such process (called a writ of *clausum fregit*, or a supposed trespass, which would allow of an arrest) was issuable before the serving of a proper original writ, and was used as process to bring the defendant in, and upon such process he was arrested, the suing of such writ was deemed a commencement of the action. For what was or was not a commencement of the action in that sense must, it was considered, be determined by the course of the court. And that was the reason why a bill in the King's Bench was held as the original there, and the want of it, aided by verdict by the 18 Elizabeth, c. xiv., within the words, "want of any writ original," etc. (*Hobart*, 204). The statute was expounded liberally, and the result was that original writs were no longer issued. This was an abuse wholly contrary to law. The result of that was, that the parties to be sued were no longer summoned, but process of arrest, either *capias* in the common pleas, or *latitat* in the King's Bench, was issued in the first instance, upon which he was at once arrested. That the requiring special bail, or bail to the action — *i. e.*, for the amount of the demand or claim in the action — was an abuse is manifest, because so lately as within a few years after the close of this reign, in the reign of James I., it was taken as clear law that "the *capias* is but mesne process, which is out of doors by the appearance of the party" (*Tuthill v. Milton*, *Yelverton's Reps.*, 158) — that is to say, that the only object of it was to enforce appearance, and that therefore bail ought only to be taken for appearance. And, further, that it ought only to be issued after default of appearance on summons (*Ibid.*). It has already been seen, in noticing the statutes 8 Henry VI. and Henry VII., as to process of arrest and bail, that upon the general words in the statutes allowing process of *capias* in default in appearance on summons, and requiring the sheriff to take bail, the practice of the courts, grounded on a large judicial construction, had established a right to take not only bail for appearance (*i. e.*, common bail, as it was called), but bail to the action (*i. e.*, special bail, as it was called, or bail to satisfy debt and costs upon judgment). This was entirely by force of practice, and the whole system of process of arrest and bail was grounded either upon the unwritten practice or the express rules of the different courts upon the subject. It was found that the practice was abused, as of course it would be, the practice itself being a gross perversion of the statutes. The same thing can be

the usage to put in the place of real ones only nominal pledges. After this it was no longer of any use to serve

shown clearly in another way, viz., that if it were intended to require such special bail to answer for the condemnation money, the statute would have required that security should be taken to "stand to" the law, or to do right in the suit, or some equivalent words, for it was held on a recognizance to have the party in court, *ad standum juri in hæc parte*, that the effect of the latter words was that, although the party had appeared, yet if he had been condemned in the suit, and had not paid the money, then the bail should answer for it; and this was put entirely on those latter words, *ad standum juri*, which, it was said, did "import the whole, and include all that was to be done, as well in the course of the suit as the effect of it," viz., execution, which was but part of the party's standing to the law, and this was distinguished from the other part as to appearance (*Barnes v. Wortlich*, *Yelv.*, 59). It is obvious that the form of the bail-bond upon process of arrest would depend upon mere practice. At the time of the above statute, it appears that the practice was to require a recognizance from the bail that the defendant should upon due notice appear, and also that if he should be condemned in the action and should not pay, that they would answer to the plaintiff for the amount. And the latter part of the condition depended upon the former, so that if there was no right to appearance (for want of proper notice), then the bail were not liable for the amount (*Hargrave v. Rogers*, *Yelv.*, 52). That it was only mere practice which required such special recognizances of bail, appears from this, that in certain actions, as in actions upon penal statutes or against executors, only common bail was required (*St. George's Case*, *Yelv.*, 53). By the general practice, however, special bail to answer for the condemnation money was required. That the whole practice of requiring special bail, or bail to answer the amount of the judgment, was an abuse, and could have been repressed by the courts by mere rules of practice, is manifest from the fact mentioned by the author that the Court of Common Pleas, in the course of this reign, made an order that, in actions where the debt or damages did not amount to £20, the defendant should put only in common bail. The whole subject of arrest and of bail was in truth regulated by mere practice, and left, as the author observes, to mere usage, with the exception of that rule. And no subject more illustrates the importance of the power of the courts to regulate their own practice. The neglect of the courts to regulate the practice of arrest and special bail, and the gross abuses which prevailed, led to the statute of Charles II., which deserves notice here. The 13 Charles II., st. 2, c. 2, recited that by the ancient and fundamental laws of the realm, when any person was arrested by any process issuing out of the courts at Westminster, in any common plea, at the suit of any common person, the true cause of action ought to be set forth in the writ, whereby the defendant may have certain knowledge of the cause of suit, and the officer may know how to take securities for the appearance of the defendant: and enacted, that no person arrested on a writ in which the true cause of suit was not expressed, and for which the defendant would be bailable by the ancient statute of Henry VI., should be forced to give security for appearance beyond a certain limited sum named: and further, that upon appearance for such persons by attorney, the bonds so given for appearance should be discharged. This enactment was general and distinct, and applied in every case of arrest; and it was only by practice that special bail was taken in the way of security in the action for the sum recovered and costs. This act, it was shown, gave the courts full power, or rather implied that they had such power, as they undoubtedly had, to make regulations for the purpose of carrying out this act, and preventing the abuses

the original, or summons, upon it, and therefore a practice begun of suing it out, and getting it returned, of course, without doing anything upon it; and as the courts had long ceased to keep that tight hand upon the process of *capias* as they did in the reign of Edward III., and plain-

their own neglect had caused. On the statute 13 Charles II., it was said that the statute was meant to prevent oppression in requiring special bail where there was not cause, or no great cause of action; and, therefore, in serious cases, even on a general latitat, the court could order special bail as on affidavit of a serious cause of action, though it should seem that the proper way was to move for a special writ upon the affidavit, and then upon such writ special bail could be required (*Roberts v. Slingsby*, 1 *Sid.*, 307). Thus it was moved in another case to have a special latitat (*i. e.*, with the *ac etiam* clause), even where the party meant to declare only for trespass, where it was stated to have been a great injury, as mayhem; and it was said by the court, that upon affidavit of that they would direct a special writ to be issued, and upon that there could be special bail required. And *quære*, if it should be in an action on the case upon affidavit of great damage? (*Ibid.*, 276). In another case it was said that special bail should only be required under the statute where by the rules of the court it was requirable before, and that neither before nor after could the *ac etiam* be inserted in order to require special bail, unless the cause expressed appeared to be of real value, as debt, trover, etc.; but where special damage might arise only upon grounds laid specially in the declaration, there special bail could not be required (*Chetman v. Venner*, 1 *Sid.*, 183). And so in an action on bond to perform covenants; as the damages were wholly uncertain, the court could not allow special bail until ascertained by reference to the master what the amount of damage might be; for otherwise, it was said, bail might be enforced when the cause of action was extremely trivial (*Booths, by Butler*, 1 *Sid.*, 63). Under these statutes it is obvious that the courts had ample authority to frame rules of practice, which should require affidavit and a judge's order to allow of an arrest. That course, however, was not only not taken, but a contrary practice was established, allowing arrest at the pleasure of the plaintiff, a power greatly abused to the purpose of extorting security for demands, perhaps excessive, even if not entirely ill-founded. Hence a series of statutes, with a view to effecting that which judicial regulation of the practice could easily have effected, viz., placing the power of arrest under judicial control. The 12 George I., c. 29, continued and confirmed by various statutes (43 George III., 7 and 8 George IV., c. 71), directed the courts to require an affidavit, and enabled them to require a judge's order to authorize arrest on mesne process. Here again, however, the practice of the courts fell very far short of the intentions of the legislature, and failed to carry out their object. The judge's order was only required in cases of damages, and the affidavit was not allowed to be controverted, unless it could be conclusively answered; and even then, it was after the arrest had been effected, the writ being issued at the pleasure of the suitor, and even the order a mere form (*Bell v. Rogers*, 12 *Price*, 194; *M'Guinis v. M'Cartney*, 6 *D. & R.*, 24). The statutes, however, did not allow of arrest in cases under £40; but it is manifest, that the real evil, the allowing of arrest on affidavit, was little checked by this enactment, which could not affect cases of excessive demands. Finally, the uniformity of process act, 3 and 4 William IV., c. 39, perpetuated the mischief, by allowing actions to be commenced by process of arrest and 1 and 2 Vict., c. 110, required an affidavit of debt, and of intention to abscond.

tiffs had been in the habit of taking it out of course in the office when the old process was spent, without applying to the court for leave so to do: as this had long been the usage, it happened, when they began to return the original of course, and the old process upon it of summons, and attachment dropped, that the first writ the defendant heard of was the *capias*.

These changes were effected after the reign of Edward III.; but it is not easy to fix the period when they happened, or trace the steps by which they were brought about. These are points of practice which are scarcely ever touched upon by the books, as they rarely came under the consideration of the court.

However, the original was for the most part still preserved, with all its legal forms: it was first issued, was the ground of the action, and, as such, stated the matter of the action specially, being also regularly rehearsed as a part of the declaration. Consistently with this the process of *capias* was also special; and a copy of the original, and the whole of the proceeding, was in the ancient mode.

Notwithstanding this was the general practice, there is an order made by the Court of Common Pleas in 15 Elizabeth, which intimates that attorneys had ventured to deviate still further from the old practice, and used to take out process of *capias* without any original to warrant it: for it is there ordered, that no clerk shall make any process unless the original writs thereof be first taken out in the remembrance of the filazer of the county where the action is commenced. And that attorneys might not evade this regulation by making out the process themselves, it is by the same order further provided, that the filazer and his clerk only shall make the process thereof, upon pain of the attorney or clerk paying such fine as the court shall impose.¹ This was a symptom of the practice which took place in the following reigns. It remained for those times to establish these novelties; to model, transform, and transpose the writ and process, in a manner which has totally disguised the regular order of proceeding, and introduced no small degree of perplexity and confusion. Notwithstanding the order of court above mentioned, this

¹ Prax. Ut. Banc., 37.

new practice received great encouragement from the stat. 18 Elizabeth of jeofail, which makes the want of an original no longer an error on the record.

The precipitating the process of *capias* in this manner was productive of some evils; for as the law now stood, it does not appear but that a defendant was liable to be arrested and held in custody, till he put in bail, in every action where a *capias* lay; though the debt or damages were but forty shillings, and just sufficient to give jurisdiction to the court. The Common Pleas took this into consideration; and in 24 Elizabeth made an order that, in all actions personal, a defendant upon a *capias*, returned against him *cepi corpus*, or *reddidit se*, making appearance in proper person, shall put in *good bail*; and that in all actions personal, where the debt or damages do not amount to £20, the party shall be admitted to common bail.¹ This gave relief, at least, in actions sued in the Common Pleas.

Whether the King's Bench made any formal order of the like kind, in actions brought there by original, or a practice analogous to this obtained there, after this alteration in the Common Pleas, does not appear in this reign. But it rather seems, by some cases, in after times, that this point of special bail was left to usage, without any formal order about it. However, there could not be the same doubt as to bills of Middlesex and *latitats*; which, being for trespass, and containing no specific demand of debt or damage, as they were not to be governed by any regulation of that kind, still continued in their full force; and defendants were thereupon obliged to give special, or as it was then called, *good bail*, without knowing the cause of action.

That defendants might not be harassed by attending at a distance from home, it was ordered by the Court of Common Pleas, in 15 Elizabeth, that no attorney shall sue an action, other than debt, but in the proper county, where the cause of action arose, without leave of the court; under penalty of forty shillings for the first offence, and expulsion for the second.² A method was taken to oblige sheriffs to execute process with regularity. Not content with the proceeding by attachment, the Court of Common

¹ *Prax. Ut. Banc.*, 62.

² *Ibid.*, 58.

Pleas in 15 Elizabeth made an order, that sheriffs and their deputies shall return all writs and common process that shall be delivered to them, or of record, and deliver them, or send them returned into that court within eight days after they are returnable, under the penalty of forty shillings.¹

Many orders were made at different times by the Court of Common Pleas to regulate the issue and conduct of process and proceedings; by which the several departments of the filazers and prothonotaries were distinctly marked, their duties enumerated, and such a course of things ordained, under divers penalties for the breach of it, as contributed to prevent any unfair application of writs, or other abuse in practice.²

The action of *ejectione firmæ*, which had been getting into practice ever since the reign of Henry VII., did, during the long reign of Queen Elizabeth, establish itself as the regular and only remedy for obtaining possession of freeholds and inheritances, and for trying of titles. The reports of this time are full of ejectments (*a*). Ejectment.

(*a*) The application of this action, by force of mere practice, under the sanction of the courts, to the purpose of recovery of possession of the freehold or trial of the title thereto, is one of the most remarkable illustrations of the power of the courts over their practice, and their capacity, by means of that power, of effecting great improvements in procedure. The action, as has been seen in the previous volume, and in earlier portions of the present, was originally a remedy for a termor or lessee, and was, in fact, grounded on a lease, and was a remedy for recovery of the possession; not like real actions of the freehold. But as it had been found possible to apply the action of forcible entry, which was originally a remedy for the freeholder, as a remedy for the termor, by allowing him to sue in the name of the freeholder, and allege his own ouster as the disseisin of the freeholder, and obtain restitution of his own possession as a restitution of the seisin of the freeholder, so it was found possible to apply the action of ejectment, originally and primarily a remedy for the termor, as a remedy for the freeholder, by allowing him to sue in the name of the lessee. At first this was the real lessee, and the real holder of a term, granted by the claimant of the freehold, or some one whose estate he had; but afterwards a lease was made by the claimant for the purpose of suing in this action in the name of the lessee. The advantages of it were obvious; it was far more speedy, far more easy, and far more simple and available. And if the claimant recovered possession, either actual or in the person of a lessee, he practically obtained all that he could obtain in a real action. It was necessary to sue in the name of a lessee, for the courts could not alter the forms of this or of any other action. This was entirely beyond the power of the courts, as is shown by the fact that for centuries these forms had to be adhered to long after they were obsolete, and they were only altered in our own time by statute. This of itself shows the absurdity of the idea thrown out too hastily by Lord Hale, and taken up too hastily

¹ Prax. Ut. Banc., 54.

² Ibid., 34-72.

It is remarkable that this action, which produced so remarkable a change in the method of trying titles as to

by the author, that the action arose out of a mere dictum in the time of Edward IV., as if the courts by mere dicta, or even the most solemn decisions, could alter the forms of actions, or the effect of judgments. It was totally beyond their power to alter the forms of the actions or the judgment therein; and it is strange that the author should have forgotten that the original writs were settled by authority of parliament, and that it required the authority of parliament to allow the chancery to issue writs in *consimili casu*. One of the oldest actions in the law was the writ of *quare ejecit infra terminum*, and the writ of *ejectione firmæ* was framed on the authority of that statute as far back as the time of Edward I., and in both actions the term was recovered. And Dyer said, that before then the judgment was only that he should recover his term (*Dyer*, 226). And Fitzherbert says: "Where a man leaseth for years, and afterwards the lessor ejecteth the lessee, or a stranger ejecteth him of his term, the lessee shall have a writ of *ejectione firmæ*; and on this he shall recover his term again if the term be not ended." And he says in a note, that if the term was ended, the plaintiff could recover his damages, and that in 17 Henry VIII., such judgment was given, that the plaintiff should recover his term and his damages (*Fitz.*, N. B., 220). So that the only question that ever arose was whether, when the term was ended, the plaintiff could recover his damages? and there never was any question that the party could recover his term in either action. But it was a remedy for a termor or lessee, and its forms could not be changed but by statute. The courts, however, although they could not alter the nature of the action, could alter its use and application, by means of their practice. And this they did, by allowing the claimant of the freehold to sue first in the name of the lessee, under an existing lease; next, in the name of a lessee under a lease made for the purpose of trying the title; and lastly, in the name of a supposed lessee. As the substance of the action was the right to enter and make the lease, it did not matter whether there had been a lease or not, and as it was not material, the courts did not allow it to be put in issue. This was within their province as a matter of mere practice, and so they ordered it. Just as in an action of detinue, the bailment was immaterial, or in an action of trover the finding; the gist being the right to the possession. By force of the practice of the courts, proof of actual lease and ouster were dispensed with where there was an actual tenant, and judgment was allowed to be recovered against a nominal defendant under the name of the casual ejector, in case of default by the actual tenant, who might not be an actual occupant (*Yelverton's Reps.*). And statutes recognized this practice, and spoke of judgment against the casual ejector (4 *Geo. II.*, c. xxviii.). By degrees, in the same way, the allegations of entry and expulsion of the supposed lessee came to be equally nominal, and therefore not traversable; and, by the practice of the courts, the real defendant was compellable to admit lease and custom — that is, if he desired to defend the action at all (*Odinghall v. Jackson*, *Yelv.*, 225). Still for a long while the lessee was a real person and a real lessee; and, indeed, the action was really available, for a lessor and a lessee would often apparently be the party really suing, and sometimes would really be ejected, for in this reign and the next the declarators in ejectment have all the appearance of stating real facts, and were pleaded to upon these facts (*Ayles v. Choppin*, *ibid.*, 183). But sometimes it should seem that the lease and entry were merely nominal, and the expulsion in like manner assumed, for it was held in the reign of James V. that a mere servant of the pretended owner was a sufficient trespasser and ejector, and he who had the true title might bring the action against master or servant (*Wilson v. Weddell*, *ibid.*, 144). Lord Hale con-

render all the old remedies obsolete, had been applied to that purpose, and had derived its whole authority, orig-

sidered there was a connection between the subject of forcible entry and ejectment; and there appears to be no doubt that the idea of the application of ejectment to the recovery of the freehold was derived from the procedure on the statutes of forcible entry. It was settled at this time that, though it only lay nominally between those who had the freehold, yet practically it was available for the protection of the termor. For if the freeholder had made a lease for years, and had afterwards expelled the lessee, the proceeding for forcible entry might be in his name against the parties actually expelling the lessee, and yet that restitution might be made, not to him, but to the termor, thus suing in his name, and thus of course against the will of the freeholder, who had himself directed the expulsion. The cases cited show that the procedure upon a forcible entry could be adapted to the protection of the termor, although taken nominally in behalf of the freeholder, by alleging an expulsion. And it is easy to see how this could be applied to the action of *ejectione firmæ*, in order to make it available for the trial of the title of the freehold, by the claimant of the freehold bringing it in the name of the termor—first a real person and actual termor, next a real person and a nominal termor, and lastly a mere nominal party, supposed to be termor. These would be merely successive changes in the practice of the action which involved no change in its form or character; and such were the stages and changes it went through before it was thoroughly adopted by the practice of the courts to the trial of freehold titles. This had been held in this reign, in the case of Lord Norris, who, having made a lease for years to A., several being indicted for a forcible entry upon the possession of A., and disseisin Lord Norris and expelling A.; although Lord Norris withstood the restitution, yet, *volens volens*, it was granted to redress the wrong done to the termor, who, by the indictment, was found to be expelled (*Yelv.*, 81). And so it was held in the reign of James I., in the case of Sir Audrey Nowell, where several were indicted for a forcible entry into a house, the freehold of Sir Audrey, and whereof one Tracy was tenant, and for disseizing Sir Audrey and expelling Tracy; and although Sir Audrey moved that no restitution should be had (for, in truth, the entry of those who were indicted was by the command of Sir Audrey upon Tracy), and it was objected that restitution ought only to be made of the freehold; and Sir Audrey, who was supposed to be deceased, did not require it, but the contrary, yet restitution was granted in respect of Tracy, the lessee, for, in regard the indictment is a record by which the disseisin of Sir Audrey and the expulsion of Tracy appeared, the court, in its discretion, ought to repon the wrongs done in their several degrees, and that was to restore Tracy first, who was expelled, and thereupon the restitution of the freehold followed as a consequence. But if the indictment had been only of a disseisin without an expulsion, there no restitution could be, unless on the prayer of him who had the freehold (*Sir Audrey Nowell's Case*, *Yelv.*, 81). The reason was that the possession of the tenant is the seisin of the landlord, so that putting back the tenant was a continuance of the seisin in the landlord. But to render the remedy applicable to the protection of the termor it was necessary to show an expulsion. And in *ejectione firmæ* an expulsion was alleged. There was nothing in the statutes of forcible entry to prevent a peaceable entry by a party having a right of entry. In Plowden, 92, it is laid down that if a person, having a right of entry, has done any act so that the disseizee might have an action against him if he was a stranger, the law saith that rather than he shall be punished, it shall be an entry and remitter to him (*Plowden*, 92). It was, indeed, held that, where the right of entry is disputed, and an-

inally, from no other judicial sanction than the *dictum* we before related in the time of Edward IV., which was suc-

other party is in actual possession, so that there is reason to believe an entry will be resisted, the proper mode of regaining possession was by the action of ejectment, which action, it was said, had been devised for the very purpose of affording a peaceable yet not dilatory remedy for parties having rights of entry (*Sir Moile Finch's Case*, 2 *Leon.*, 134; *Bartlett v. Viner*, *Cults*, 252). Thus out of the practice of the courts, suggested in one action and reversed in the other, the action of ejectment was applied to the trial of titles generally. In the course of this reign it was laid down that in the action of ejectment the plaintiff should recover possession of the land, and should have execution by writ of *habere facias possessionem*; and it was also said that at that day all titles to land are for the greatest part tried in actions of ejectment, and it was the only action, it was said, in which judgment was given for the recovery of the possessions (*Alden's Case*, 5 *Coke's Reps.*, 105). For that reason, a judgment in ejectment was not final, for it was only on the right to the possession, which might be altered; and hence it was said, in the same reign, that the recovery in a real action was final, except that a writ of right might be brought as the last and final remedy, for that otherwise great oppression might be done, as if there should not be an end of suits, then such man might infinitely vex him who had right by suits and actions, and in the end compel him to relinquish his right; all which was remedied, it was said, by the rule and reason of the common law, which was, that when any one brought a real action, and was barred, he and his heirs were barred of their entry, and were put to the writ of right — their last and final remedy — the neglect of which rule, by introducing trials of rights and titles of inheritance in personal actions, *i. e.*, actions of ejectment, in which there was no end and limitation of suits, had produced great inconveniences, infiniteness of suits, contrarieties of verdicts and judgments, and the continuance of litigation for twenty, thirty, and forty years (*Ferrer's Case*, 6 *Coke's Reps.*, 7). The statute of limitations of Henry VIII., it is to be observed, only limited real actions, not actions of ejectment, because at that time they were not used for trial of titles or freeholds, but now they were; and hence, for the reasons just mentioned, the statute of James I. was framed, which limited rights of entry and actions in ejectment. The action being in its nature possessory and grounded on a right of entry, it was necessarily in the first instance against the tenant in possession; but then at common law, upon principles deduced from the analogies afforded by real actions, the landlord or reversioner could apply to come in and defend, as otherwise he might be deprived of his land by collusion of the tenant with the claimant (*Fenwick's Case*, 1 *Salk.*, 257). There was, indeed, so far an analogy between real actions and ejectment, that as to the possession of the land, ejectment was a real action, so that in a judgment in ejectment there could be *scire facias* against a party in possession (*Withers v. Harris*, 1 *Salk.*, 258). And it was the practice of the courts to let the landlord in to defend the action in order to try the title (*Fowler v. Fairclaim*, 1 *Co. Bla.*). In a certain sense the action was considered a real action, as it was for recovery of real property. For although the term recovered was personal, *quatenus* it is a chattel, it is real; *quatenus* it concerned land. The reason of the *scire facias* in ejectment was that the land was bound by the recovery, and that makes a title to the recoverer. If there is tenant for years with reversion in fee, tenant for years is ousted, and he in reversion disseized at common law, the remedy for the tenant for years was ejectment, and assize for the reversioner. Then, if the lessee for years obtained judgment against the disseizor for the term, that made him a title (*Proctor v. Johnston*, 1 *Lord Raymond's Reps.*, 670). In all real actions at

ceeded by the adjudication in the time of Henry VII. So common had they now become, that excepting *assizes*, *precipe quod reddat*, and *formedons* now and then, real actions are hardly to be met with.

As ejectments were brought to their height in this reign, so were actions upon the case, which were now the most usual remedies in most matters, whether of *tort* or *contract*. However, *debt* used sometimes to be brought, and there are records¹ which contain the wager of law (*a*).

The learning of estates, which had revived under Henry VIII., attended with the circumstance of *uses*, The learning of estates. continued to take up much of the attention of courts. Other statutes of that reign, besides that of *uses*, had given occasion to debate on points of this sort, particularly the statute of wills, which, by enlarging the powers of alienation, set much landed property at large, to become the subject of future litigation. To this may be added the dissolution of the religious houses, which had a prodigious effect in multiplying the causes of judicial determination. So frequently do matters of real property recur; so thoroughly were they argued, and so solemnly determined upon, that it would be difficult to say what points had not been more or less sifted. Recoveries, fines, estates, with their properties and incidents, were discussed in all shapes, and under all circumstances.

There had not yet been a period of our law when questions were so learnedly considered. Whatever we have before said of the time of Henry VIII. may be repeated of this in higher terms. Besides general argument, upon principle and solid reasoning, they called in to their aid the decisions of cases in former times: these were now

common law, whenever tenant of the freehold made default, the reversioner or remainder-man had a right to come in and defend the possession, because if judgment were had against the tenant in possession, it turned the estate of those behind to a right. This was expressly also allowed by an ancient statute (the statute of Westminster 2, c. iii.) as to real actions, and was as to the action of ejectment expressly confirmed by a modern statute, the 11 George II., c. xix. (*Lord Mansfield, C. J., Fairclaim and Fowler v. Gower*, 1 *W. Black.* 359).

(*a*) The action of detinue, though in form like debt, was really for a wrong, *i. e.*, for the wrongful detention of goods, the bailment being mere form, and the substance and ground of action being the detention (*Bateman v. Allman*, *Cro. Eliz.*, 866). As it was subject, like debt, to usage of law, the action of trover was substituted for it, which was an action on the case, just as *assumpsit* was substituted for debt.

¹ Coke's Entries.

quoted more profusely than ever, since they had lately come into the hands of everybody by printing the Year-Books. Cases were almost a new kind of learning in the law, and they were applied and reasoned upon with great dexterity. This led to greater length of argument, as well as furnished more authentic materials, upon which to found it; nobody spoke but from authority, and it was expected that everything should have its precedent; both sides had theirs, and the negative as well as the affirmative of almost every question was rested on authorities. This made it necessary to weigh with much judgment the cases quoted, to make sure of the facts upon which they arose, and the ground of law upon which they were determined. They were compared and examined; differences were in this manner often discovered between the former determination and that under debate, to which it had been endeavored to apply it. Upon these, distinctions were struck out; cases seemingly opposite were often reconciled by these distinctions, and the true principles of decisions were often extracted from determinations apparently contradictory.

This was the style of great law arguments at this time, and that in which they have run ever since. Our law is the work of ages; and being formed by the adjudications of courts as well as by statutes, it follows, from its very structure, that no position ought to carry with it the weight of authority, unless it refer to some rule or principle well founded, or else to some particular instance sanctioned by a judicial decision (*a*). This must always have been the opinion of lawyers, long before adjudged cases got commonly into the hands of the world; but now, when a series of decisions for many years back, and those taken down by persons properly appointed, had been printed (the Year-Books), it became only more usual and more fashionable to call in the aid of some case to support every proposition of law.

The judges entered so fully into matters argued before

(*a*) It is impossible even to understand statutes without reference to legal principles. Thus Lord Coke again and again observes, "how necessary it is for the understanding of an act to know what the common law was, and the reason of it" (2 *Inst.*, 300). For "to know (says he) what the common law was before the making of any statute (whereby it may be known whether the act was introductory of a new law or affirmatory of the old), is the very lock and key to set open the windows of the statute" (*Ibid.*, 308).

them, that the opinion of the court often contained a history of the point of law in question, with all its incidents: and, not content with determining the single point before them in issue, they would set about resolving solemnly a string of propositions, some of them intimately connected with, but some of them collateral to, it: such, however, which would naturally follow from the main question, either as conclusions or corollaries.¹

Notwithstanding the number of questions upon real property which were argued in the courts of common law, many were prevented from appearing there by the course of conveyancing now in use. Many estates were thrown into *trust*, and under that denomination became subjects of inquiry into the Court of Chancery. There a new sort of learning arose upon these matters of confidence; the practice of the law was thereby enlarged, the scope of study extended, the objects of litigation multiplied, and a new turn given to the old law, upon which these accessions were engrafted. If estates took a new appearance when clothed with *uses*, they were quite disfigured by the fashion superinduced on them by *trusts*. To preserve the ancient established rules of law inviolate, and give efficacy to these new doctrines, was a difficulty which lawyers were now constrained to reconcile; and this constituted a new modification, if not an entire new species, of equitable law.

As the increase of commerce brought personal property into higher consideration, the learning concerning it increased in magnitude. The reports of this reign contain more questions upon personal rights and contracts, in one shape or other, than perhaps those of all the preceding reigns put together. The law of private rights in general became more settled and better understood.

The conveyances to uses were those in common practice, with very little alteration, except that they were more encumbered with substitutions of Conveyances. estates, and with provisos, covenants, and conditions, all couched in a minuteness and prolixity of language which had been gradually increasing ever since the beginning of Henry VIII.'s reign, both in deeds and in acts of parliament. These conveyances were mostly *covenants to stand*

¹ 1, 2, 3, 4, 5 Reps., *passim*.

seized, and other covenants. The conveyance by *lease and release*, invented, as we have seen, in the reign of Henry VIII., does not seem as yet to have been very common, for there is no precedent of one in any of the books of precedents of this period.¹ *Feoffments* were rarely made use of but when possession was to be gained, or where the estate was small and the objects of conveyance few, and the parties could not easily bear the expense of the other voluminous instruments..

The nature and properties of uses underwent, in this reign, a more complete investigation than they had received before. Their origin and progress, with the operation of the statute upon them, were canvassed in every point of view; and this whole branch of learning was settled upon such principles as have governed it ever since. The law of uses and trust, when thus reduced into a system, became more refined and subtle, though less vague and intermediate, than it had been in former periods.

Among other points which had been agitated in the last reign, that concerning the interest and power of the feoffees was again brought forward, and was debated with various success. In the 10th of the queen, this question arose in a peculiar way, in the case of *Delamere and Barnard*. The case was, that Robert and his wife being tenant in special tail, with remainder to Robert in general tail, remainder to Simon in fee. Here Robert enfeoffed *D.*, who, before the stat. 27 Henry VIII., enfeoffed *B.*, who enfeoffed Simon, the remainder-man in fee, and he enfeoffed the defendant Barnard, on whom (after the death of Robert, the first feoffor, and of the feoffees) the heir of the surviving feoffee entered for reviving the use to the plaintiff, who was the wife of Robert. The doubt in this case arose entirely upon the feoffment of Simon, the remainder-man; for it was agreed on all sides that the feoffments by Robert to *D.*, and by *D.* to *B.*, were all defeasible after the death of Robert by the feoffees, who might enter to the use of the wife of Robert. But it was said that, when Simon made a feoffment, he gave quite another thing than he received by the feoffment made to him, for he gave his use of the fee-simple, which he had upon a good and indefeasi-

¹ Boke of Bec. and West's Symbol.

ble estate. And, therefore, it was argued for the defendant Barnard, that Simon had given a good and indefeasible estate under the stat. 1 Richard III., which confirms all estates made by *cestui que use* against the feoffor and his heirs, and all others claiming only to the use of the said feoffor at the time of the gift made, and as the feoffees claimed to the use of Simon, as well as to the use of the estate-tail; and, therefore, said they, the feoffees are barred from claiming their fee-simple, because it was legally given to Barnard. Not, therefore, being able to have their ancient fee-simple, they must have a new one, or none at all; and as to that, they said he had no legal claim to any but the old; and if he had another there could not be two fee-simples of the same land, which would not be allowed by law, and he could not have less than a fee. And in this manner they concluded that the feoffees had no right of entry under the particular circumstances of this case.

To this it was answered that the *cestui que use* within the stat. 1 Richard III. is *cestui que use* in possession, and not in reversion or remainder; and the feoffees, as they claimed not only to his use, but to the use of *cestui que use* in tail, are not barred; and as the present feoffment was not within the letter, so neither was it within the intent of the act, which would never give such power to him in reversion or remainder who had no right to the profits; and they said such a power would lead to all sorts of confusion. They said, when Robert made the feoffment, he had full power to do it by the stat. 1 Richard III.; and the fee-simple passed most completely till regress made by the feoffees, which they might do after his death, if there was no obstacle but his feoffment; for that being good only against those claiming to the use of the feoffor and his heirs, and the feoffees, after his death, claiming not to the use of his heirs, but to the use of the wife, the present plaintiff, they were not restrained from entering by the statute. But, in the meantime, the fee being taken out of the feoffees by the feoffment, the use in fee was taken out of Simon, and discontinued until the feoffees had made their regress.

This being the great difference between a feoffment made by the feoffees and by *cestui que use*, in the first instance, if the near feoffees have notice of the first uses (whether the feoffment was upon consideration or not), or

if they had not notice, and the feoffment was without consideration, in such cases the new feoffees would be seized to the first uses. But, in the second instance, if the *cestui que use* may lawfully make a feoffment (which is the present case), all the ancient uses are discontinued, though the feoffee had notice, and there was no consideration. For all the first estate out of which the uses were to arise, was thereby taken out of the feoffees, and a new estate made by the authority of the statute, which estate was always to be to the uses newly expressed, and to no other. Thus, then, the use to Simon was discontinued, so that, having only a right to a use in remainder, and not an actual use in fact, he could alien none. In respect of that use, therefore, he could do nothing effectual, nor could anything he did be executed by the statute of uses,¹ that statute conveying no possession to a right of use, but only to a use *in esse*. The feoffment of Simon, they said, was not within stat. 1 Richard III., not only because his was a use in remainder, but because it was only a right to a use; if, therefore, it was not warranted by that statute, it was a feoffment at common law, and no such feoffment at common law could take away the entry of the feoffees.²

This point was argued at least ten times; and, at length, all the justices agreed that the entry of the heir of the feoffee was lawful, and the use being revived in the wife, it was immediately executed in her by the stat. 27 Henry VIII. They all saw how dangerous it would be to allow *cestui que use* in remainder, by release or other act, to hinder the feoffees from entering to revive the particular uses, and that no such mischief could be intended by the statute of Richard III. Another point was started, and took up some debate; this was, as the uses were revived only to the wife in tail, remainder in tail to the heirs of the body of the husband, in what person the use in fee-simple should be revived: some argued it was extinguished, and so resulted to the feoffee; others said it was revived to Simon, others maintained that it should be in Barnard; and reasons were given for the disposal of it in each of these three ways. But this making no part of the cause before the court, the chief-justice Catline waived giving any opinion on a matter that appeared to carry some difficulty in it.³

¹ 27 Hen. VIII.² 10 Eliz.; Plowd., 351.³ Ibid., 352.

In the case of Dame Baskerville, this point of the entry of the feoffees was again agitated. A person *cestui que use* in tail, remainder over in tail, remainder to himself in fee, made a feoffment in fee to his own use for life, and then to his eldest son and his wife for life, remainder to them in special tail, remainder to the right heirs of the feoffor; after this came the stat. 27 Henry VIII.; the father then died, the son and his wife entered, and are seized of the estate-tail executed by the statute. In this state of things it was made a question, whether the feoffees might enter, and divest the possession out of him and his wife, and revive the use according to the ancient entail. And it was the opinion of Dyer and Manwood that the entry of the feoffees was unlawful, for two reasons: one, because the fee-simple of the use was legally passed away, and the right of the feoffees bound by stat. 1 Richard III., so that they could not, by their entry, recover their ancient fee-simple; secondly, because the son and heir could not have any other estate, contrary to his own act, and contrary to stat. 27 Henry VIII., so that he could not be remitted to his ancient use: this opinion was reported in Chancery, and Catline and Saunders joined in it.¹

The above opinion seems not to correspond with what was agreed on all sides in *Delamere and Barnard*, about the feoffment by a particular tenant. In the following, which is commonly known by the name of *Lord Paulet's* case, this matter was spoken to more explicitly than in the last, or any former occasion. A feoffment was made to the use of the wife of the feoffor for her life, if the feoffor survived her; then to the use of the feoffor, and of such person as he should happen to marry for their lives, for a jointure, with remainder over in fee; after this the remainder-man in fee, together with the feoffees, and with the privity and consent of the feoffor, joined in a feoffment to new feoffees, to other uses, and the feoffor levied a fine to the other uses. Then the wife died, and he took another, and died; after which the second wife, by command and assent of the first feoffees, and after five years since the fine, entered to revive the use, declared in the first feoffment to the second wife. It was much debated whether this entry was lawful. Monson and Harper

¹ 15 and 16 Eliz. Dyer, 329, 17.

thought that the entry was lawful ; and they even thought that the second wife need not have the consent of the first feoffees ; because they were barred of all right and interest in the land by stat. 27 Henry VIII., which vested all the estate and title of the feoffees in those who had the use, in the same manner, quality, form, and condition as they had the use. They thought the possibility of a future use to the second was reserved and preserved in the custody of the law ; and if anything was left in the feoffees, it was only a power and authority to make an entry, which was no interest in right in the land ; from all which they concluded that nothing passed by their feoffment to the new feoffees. Monson and Harper so far differed, that the former thought that if the feoffees had a title to enter to revive the use, then the feoffment would be an impediment to the entry, and that such feoffment was a disseisin to the particular tenant. The latter did not agree to that. But Manwood and Dyer assented to the opinion of Monson, relying upon a case in the time of the late queen, where the remainder-man in fee enfeoffed a stranger in the absence of the tenant for life ; and though the tenant for life occupied during his life, this was held a sufficient feoffment of the fee ; and to this the chief-justice Wray and chief-baron Saunders agreed.

It was the opinion of Manwood and Dyer that though the future use was in abeyance, and in *nubibus*, and in no certain or known person, yet when the contingency happened, and the use also, it was necessary for the feoffees to enter in order to raise this *dead use*, for they were the persons put in trust by the feoffor who created use ; and the feoffment and estate that the feoffees accepted was the root and foundation of the said uses, which sprung from it as the branches or fruit from the trunk of a tree. They said, if the feoffment to the first uses had been before the stat. 27 Henry VIII., then the feoffees after the statute need not have entered to awaken the dormant use, as in case of feoffment of *cestui que use* ; but the second wife might have entered of her own authority : but in the present there is a difference ; for here, they said, there was a disturbance and alteration of the uses, and this was with the assent of the feoffor and founder of the uses, and of the feoffees in trust. They said that at common law the feoffees had sufficient power to change and destroy the use

and trust by alienation and limitation, against which there was no remedy but to obtain by subpœna in equity a recompense, and inflict a punishment for the breach of trust.

When the new feoffment was made to new uses, by assent both of the feoffor and feoffee, they said no injury was done to the second wife, who was not *in esse*, nor a person known or ascertained. They said, though by the words of the statute the freehold and fee-simple which was in the feoffees were taken out of them, and vested in *cestui que use*, yet, said they, *adhuc remanet quædam scintilla juris et tituli, quasi medium quid inter utrosque status, scilicet illa possibilitas futuri usûs emergentis, et sic interesse et titululis, et non tantum nuda auctoritas seu potestas remanet.*

The other part of this case turned upon the estate given in jointure to the second wife; and Dyer thought that she could not take any estate at all, for she was not capable, nor *in esse* at the time when the remainder fell to the baron; and if she could not take then, no more should she afterwards; the same as if it was the remainder of an estate in possession. However, all the other justices thought an estate in use differed in this particular from an estate in possession.¹

This last point of the contingent estate, as well as that of the entry of the feoffees, was thoroughly discussed; and, after full examination, was solemnly decided by all the judges, about fifteen years after, in the case of *Dillon and Freine*, or *Chudleigh's* case, as it is sometimes called. The last point in *Lord Paulett's* case upon the keeping alive and perpetuating, as it were, the contingent estates, was one of the most interesting topics that arose upon the condition of feoffees to a use. In many of the cases that have already been mentioned, there was some reference to this idea; but in the cause which we are now going to consider, this became the principal question, and, on that account, it has been called the *Case of Perpetuities*. As the nature of uses was fully investigated in the arguments on this occasion, and the principles then ascertained have been adhered to ever since, it is necessary that this case should be considered with great attention. The facts upon which it arose were these: Sir Richard Chudleigh had issue several sons, and enfeoffed certain persons to the

¹ 16 Eliz. Dyer, 339, 48.

use of themselves and their heirs during the life of his eldest son Christopher, and after his death to the use of the eldest son of Christopher in tail, and so on to the tenth son, with remainder to his second, third, and fourth sons in tail; remainder to his own right heir. Sir Richard died, and before issue born, Christopher was enfeoffed by the feoffees, and after that had two sons. It now became a question whether the use which before was in contingency should vest in the sons of Christopher, and be executed by the stat. 27 Henry VIII.; or, in other words, whether such contingent uses, before their existence, were destroyed and subverted by the feoffment of the feoffees, so as never to rise out of the estate of the feoffees after the birth of the issue. This question was argued many times in the court of King's Bench; and because it was a point of great importance, it was thought proper to refer it to all the judges in the Exchequer Chamber, where it was again argued in two different terms: at one of which the famous Coke, then solicitor-general, and at another the more famous Francis Bacon, spoke against the contingent use. With these all the judges, except two, agreed, and determined that there resided in the feoffees no right of entry to revest the uses. The substance of the reasons given by the judges was as follows:—

Walmesley, justice, Sir William Periam, chief-baron, were the two dissenting judges. They said that, before the stat. Richard III., the feoffees had not only the whole estate, but the whole power to give and dispose of the land. After that act, *cestui que use* had power to dispose of the land itself; notwithstanding which the estate remained, as before, in the feoffees, till *cestui que use* had made a disposition; so that the *cestui que use* was not sufficiently protected by this regulation, for they might prevent his availing himself of the act by making covinous conveyances; and often the one disposing under the statute, and the other at common law, they confederated together to deceive purchasers. They said that stat. 27 Henry VIII. was not made to eradicate uses, but, they said, it had advanced them, and established safety and security for *cestui que use* against his feoffees. Before the statute the feoffees were owners of the land, and since that, the *cestui que use*; before, the possession governed and ruled the use; since, the use governs and rules the possession; for by the act

the possession is made a subject to, and follower of, the use. They said that nothing in the preamble of the act, condemned uses; but the act is expressed to be designed for extirpating and extinguishing all such *subtle practised* feoffments, fines, recoveries, abuses, etc.; and these were not to be extirpated by destroying uses, but by divesting the whole estate out of the feoffees, and vesting it in *cestui que use*. So that it would, they said, be against both the meaning and letter of the law to say that any estate, or right, or *scintilla juris* remained in the feoffees after the statute; particularly, when it appears from the preamble that the statute was for eradicating all estate out of the feoffees, and the letter of the body of the act is, that the estate which was in the feoffees should be in *cestui que use*, which was a judgment of the whole parliament, that the estate was out of the feoffees. They said that the *scintilla juris* mentioned in 17 Elizabeth was like Sir Thomas More's "Eutopia," and that no trust or confidence was reposed in the feoffees. *Non possunt agere, aut perficere aliquid* in prejudice of the feoffees. Thus far as to the meaning of the statute, and they said, that, according to the *letter where any person or persons stand or be seized, or AT ANY TIME hereafter shall happen to be seized, etc.* They relied much upon the words *at any time*; and they inferred from them that the seisin which the feoffees had at the beginning by the feoffment would be sufficient within this act to serve all the uses, as well future, when they came *in esse*, as present, for there needed not many seisins, nor a continued seisin, but a seisin at any time; and it would be hard, when the statute required a seisin at one time only, to require many seisins, and at several times.

Again, if the statute was to be construed as destroying these future uses, they said the established form of pleading, ever since the statute, should be altered, for now the pleading a feoffment in fee to future uses was *virtute cujus vigore actûs part, etc.*; *cestui que use* was seized, etc.; from which it appears, that, heretofore, one seisin was held sufficient. They said, as a fountain gives to every one who comes in his turn his just measure of water, so the first seisin and estate in fee was sufficient to yield to all to whom any use present or future was limited a competent measure of estate. That in the case at bar the disturbance was not to the first seisin given by the feoffment, out of

which all the uses flowed as out of a fountain, but the disturbance was to the other seisin, namely, those executed by the statute. The first seisin, they said, could by no means be tolled or divested; for it had no essence till the future use had essence, which, by force of the statute, should draw a sufficient estate to it; but when the future use was come *in esse*, then, by reference and relation to the first seisin, there was a seisin and a use within the statute. The chief-baron conceived that such future uses, before their birth, were not preserved in the bowels and belly of the land, but that they were *in nubibus*, and in the preservation of the law; for he agreed entirely with Walmesley, that by force of the act the whole estate was out of the feoffees, and then it must either be in some person, or in abeyance and consideration of the law; and as it would be absurd to say that the feoffees should have a less estate than they took by the first livery, and the future use could not be executed till the person who should take it came *in esse* and nothing remained in the feoffees, it must, of necessity, in the meantime, be in the preservation of the law, the same as a remainder limited to the eldest son of A. was in preservation of the law till the son was born.

They pointed out this difference between feoffees before the statute and feoffees since; for if feoffees were disseized before the statute, no use could be executed after the statute without a re-entry of the feoffees, because they were not seized at the time of the act, nor would, without such entry, be seized at any time after, as the act required. Again, they remarked that the statute did not save to the use of any person *in esse*, but to the use of *another*, which should be intended when his time was come. They desired it might be considered how hard it would be to construe all the future uses in this case to be destroyed, when they had been limited on good and sufficient cause; and the sons, then *in esse*, were not parties to any wrong or covin.¹ He thought the mischief of an opinion that would destroy these uses would be so great as to need an act of parliament to secure them. These were the reasons which were

¹ The learned Justice Walmesley concluded by likening uses to Nebuchadnezzar's tree, in which the fowls of the air build their nests, and the nobles of this realm erect and establish their houses; and under this tree lie *infinita pecora campi*, and great part of the copyholders and farmers of the land for shelter and safety; and he said, if this tree should be felled, it would make a great print and impression in the land.

delivered by the two judges in favor of the contingent uses, and which they supported by the authority of cases, some of which have been before mentioned in the course of this history.¹

On the other side it was agreed, by all the other judges, that the feoffment made by the feoffees who had an estate for life by the limitation of the use, divested all the estates and the future uses also. They did not think it material that Christopher had notice of the first use, because all the ancient estates were divested by the feoffment, and the new estate could not be subject to the ancient use, as they could arise only out of the ancient estate that was now divested. Gawdy, justice, conceived that the uses limited to the eldest son of Christopher were in abeyance, and that the estates of the land sufficient to serve these future uses were in abeyance also. But he agreed it was not by the letter of the stat. 27 Henry VIII., though he thought it should be by the equity of it; for the letter of the act required it to be to the use of *some person*, and here was none: yet he said the uses in abeyance, by the equity of the statute, did draw sufficient estate to serve them in abeyance also, for the saving of future uses from destruction. He agreed that all the uses, as well present as future, were executed immediately; and that the statute was not designed for destroying uses in any other manner than by executing and transferring the possession of the land to them. He thought the whole estate was out of the feoffees; for no right of the feoffees, which they had to another's use, was saved by the statute.

He said, if a feoffment was made in fee to the use of one for life, and after to the use of the right heirs of *T. S.*, the fee-simple should be in abeyance; yet, before the statute, if a man had a feoffment to the use of one for years, and after to the use of the right heirs of *T. S.*, the limitation had been good, for the feoffees remain tenants of the freehold: but such limitation since the statute would be void; because, as nothing remains in the feoffees, the freehold would be in suspense. For the same reason they thought the remainders in future were divested and destroyed by the feoffment of the tenants for life; and although they were in custody of the law, yet they ought

¹ 1 Rep., 132-134.

to be subject to the rules of law, for the law will preserve nothing against its own rules. It was an established rule that the remainder must take the land when the particular estate determines, or else it shall be void; and here, as the feoffments of the tenants for life determined their estate, and title of entry was given for the forfeiture, when those in the future remainder were not *in esse* to take it, the remainders are void, there being no difference where the particular estate determines by the death of the tenant for life and by forfeiture. If the son of Christopher had been born at the time of the forfeiture, he might have entered. Thus they held there was no difference in this point between estate in possession and in use; and in this the two dissenting judges agreed, contrary to the opinion in which all the judges, except Dyer, concurred in the above case of *Lord Paulett*.

The following reasons were delivered by Baron Ewens, Owen, Beaumont, Fenner, Clark, Clench, the Lord Anderson, and Popham, chief-justice: They held that, at the common law, as well all future or contingent uses, as uses *in esse*, would be divested and discontinued by disseisin, or such feoffment as the present, till the first estate out of which they arose was recontinued. Now the statute 27 Henry VIII. does not transfer a possession to a use generally, but to uses *in esse*, and not to uses *in futuro* or contingency till they come *in esse*, which appears by the express letter of the act; for as there ought to be a person *in esse* seized to the use, so there ought to be a use *in esse* to rise out of the estate, and a person *in esse* to take the use, before any possession can be transferred to the use; for if the person who should take the use be not *in esse*, or if the person be *in esse* and no use *in esse*, but only a possibility (as Lord Anderson called it) of a use, there can be no execution of the possession to the use. Thus, if there could be no use at common law, if there was no seisin to it, so, since the act no use can be executed without a seisin, and of course a person capable of the use, for the statute speaks expressly of *persons seized*, and to the use of *any person*. Again, they remarked that the act speaks only of persons having a use in possession, reversion, or remainder, without any word of *possibility* or *contingency*; therefore, persons *in esse* are only within the act; and no estate is divested out of the feoffees, but when it can be executed in the *cestui que*

use. And they said those who argued on the other side had dropped half the sentence; for they only said the estate should be out of the feoffees, to which they should have added that it should be in the *cestui que use*; but that they saw, or at least it was plain from the statute, could not be, till the person and the use also came *in esse*. They said, therefore, that it appears from this clause that no estate of the feoffees should be transferred in abeyance, and vested in nobody, or be transferred to a possibility of a use that had no being.

They said, that the feoffees, since the statute, had a possibility to serve the future uses when they came *in esse*, and that in the meantime all the uses *in esse* should vest; and when the future uses came *in esse*, then the feoffees (if their possession was not disturbed by disseisin or other means) should have sufficient estate and seisin to serve the future uses; and they said the seisin and execution of the use ought to concur at one and the same time.

This case, they said, was not to be resembled to cases at common law, for an act of parliament might make a division of estates, and therefore it is not necessary the feoffees should have their ancient estates. This, they said, was just and consonant to reason; for by this construction the interest and power that every one had would be preserved by the act; for if the possession was disturbed by disseisin or otherwise, the feoffees would have power to re-enter and revive the uses according to the trust reposed in them: and if they bar themselves of their entry by any act, this, not being remedied by the act, would remain at common law. But at any rate no use could arise to persons not *in esse* till the impediment was revived, and the estate of the feoffees was recontinued.

They said, if such a construction of the stat. 27 Henry VIII. was admitted as was made by those who argued on the other side, so as by the equity of it to maintain and preserve future uses, greater inconveniences would be introduced than those complained of before the act. It would in effect be establishing a perpetuity of estate, with all those grievances which had been so long felt from the statute *de donis*, if they continued undisturbed; but if they were broken in upon, all those mischiefs would happen which were complained of respecting uses before the act, such as dormant claims and insecure title. This topic of perpet-

unities they thought sufficient reason to determine the question upon, if they had not had the ample grounds of law, upon which they had endeavored to found their decision.¹

This is the substance of the reasons given by some or other of the judges who were of opinion against the contingent use. The arguments on this great question have been given more at length than we have usually allowed ourselves, on account of the great importance of the subject; and because this case became afterwards a leading decision not only on uses, but on all contingent limitations.

In tracing the progress of uses, the next subject that presents itself is a *covenant to stand seized to a use*; a conveyance which has frequently been mentioned already, and which, after long doubt and several discussions, had at last been recognized by the courts as a legal title to a use. But the validity of this conveyance depending wholly upon the consideration that moved the granter to make it, an opening was still left for argument; and the sufficiency of the consideration was debated with almost as much difference of opinion as the covenant itself had been in former times. In the eighth year of the queen a case happened, where, after some argument on both sides, certain principles were laid down which have governed ever since; this was in *Sharrington v. Stratton*. An indenture of covenant had been made, expressing the granter's wish that the lands should continue and remain in the family name of Baynton: for the good-will, brotherly love, and favor which he bore to his brother, he made several limitations in favor of his brother and his brother's wife, and then of his own male issue.

This covenant was brought in question, and several objections were stated to it. It was maintained that no use was conveyed to the brother by this covenant. The granter, if he wanted to convey any use to a stranger, should have taken one of these two ways: either to part with the possession by a feoffment, fine, or recovery; or to keep the land in his own hands, and yet do some act which, because

¹ The opinions of the judges as collected and blended by Lord Coke are not, perhaps, the most satisfactory part of his report. The whole subject is treated with more method and perspicuity in the argument which precedes them; and which, probably, was his own argument in court as counsel against the contingent use. (1 Rep., Chudleigh's Case.)

it imported in itself a good and sufficient consideration, would cause the use of it to be to another, as a *bargain and sale*, or covenant on consideration: as a bargain and sale for money, or a covenant, if the covenantee will marry the covenantor's daughter; the one was a benefit, the other a satisfaction and comfort, and so held by the law to be a good consideration, and such was always necessary to create a use *de novo*, where there was no transmutation of possession. But the causes mentioned in the present deed were not such. The 1st was, That the land might descend to and remain in the heirs-male of his body; 2dly, That they should continue in the name of Baynton; 3dly, The goodwill and brotherly love and favor he bore to his brother.

They said, none of these imported any recompense to the covenantor; and, therefore, it was a sort of *nudum pactum*: they said, there should be an act done, or some new cause, as to marry, or the like; but here the issue male of the covenantor, his name, and blood, and brotherly love, all those were not the less so, if there had been no covenant. They said, the law required some new cause as the occasion in consideration of these covenants; that estates as they, at common law, passed by so notorious an act as a feoffment was, might not be passed in secret by these new-fashioned deeds; and if the makers of the statute of *enrolments* had not thought that some notoriety of consideration was necessary to give legal validity to these *covenants*, they would have required them to be enrolled, the same as a *bargain and sale*. They quoted and relied upon the determination in the reign of Henry VII.¹ against these covenants.²

The other side of the question was supported by the famous Plowden, whose argument is at length in his report; and there he maintains the above three causes of the deed to be sufficient considerations to raise a use; in support of which opinion he is not content with such topics as are furnished by our own law, and the favor and preference which it shows, in many instances, to such relations and ties, but travels into Aristotle and the Old Testament for the rules of natural and divine law upon this subject. However, as the above were considerations that had a new appearance, he called in the assistance of another, which

¹ 21 Hen. VII.

² Plowd., 302.

was better known in our courts, and said, that the covenant was founded upon a fourth consideration, which was the marriage of his brother; for it is evident, though not so expressed, that the deed was made for securing a jointure to his wife. They admitted, that in the case in 21 Henry VII. no use could be raised, because it was future, and also uncertain; but this was very different. So confidently did he rely upon the goodness and sufficiency of the considerations here alleged, that he said they would raise a use even without a deed.

But they went further, and said, that admitting the considerations to be insufficient, or admitting that no consideration had been expressed, yet the covenant of itself would be sufficient to raise the use. For the party could have no advantage from the deed, if it would not raise a use. He could not have an action of covenant, because there was nothing executory; for the covenantor had covenanted that he, and all persons seized of the land, shall be seized to the uses limited; and if they did not stand seized, there was no default in the covenantor. For an action of covenant must be for a thing done or to be done, as in the case in 21 Henry VII., where it was covenanted the land should revert and descend; but here he grants presently to stand seized; and if the law permits the uses to arise, he stands seized to them; if not, there is no default in him. Therefore, they inferred, if no advantage could be made of the deed, but by raising the uses, rather than so solemn an act should be disappointed, he said the uses should be raised; and if they objected that there was not sufficient consideration, he went further and said, that though in contracts by parole a consideration ought to be made appear, yet, where there was a deed, that was an act of such deliberation, that it imported a consideration in itself; as a bond charged the obligor without any inquiry into the cause of it, so, he said, ought this deed; and this he supported by many old authorities. The court gave no opinion upon this point or the marriage, but held clearly the three considerations to be sufficient causes to raise the use.¹

Plowden's opinion, that the above considerations would raise a use without a deed, was debated in court some few

¹ Plowd., 303-309.

years afterwards. A father, upon a treaty of marriage of his younger son, promised the relations of the wife that, after the death of himself and his wife, the son should have the land to him and his heirs. The man was seized in demesne, and not in use, and it was held by all the four justices of the Common Pleas that the use was not changed by such *nude* promise. This is called a nude promise, because the special verdict stated that it was without consideration *ex parte mulieris*; but when it also states that the marriage was had, it is difficult to say, upon the principle of the cases that had already been determined, that this was no consideration.¹ This question, whether a freehold should pass by parole, on consideration of marriage, had been agitated in the reign of Edward VI., when all the justices agreed that it should. Conformably with this opinion, in the case of *Collard v. Collard* some judges argued in favor of a use so raised; but when that same case came into the Exchequer Chamber, in the 38th of the queen,² it was strongly denied,³ though it was, in the meantime, in 37 Elizabeth, as strongly held in *Corbin v. Corbin*, by three judges, that a use might be raised by parole on such a consideration.⁴

By the decision in *Sharrington v. Stratton*, a covenant to stand seized was rendered a more general conveyance than it was before; it was more usually confined to cases of marriage; it might now be applied on all occasions of a family nature to settle estates. However, the courts seemed inclined to keep it within the bounds that had now been set to it. Therefore, where persons attempted to extend it further, by stating *other good causes and considerations* as a ground for the grant, they held that these words were too general to raise a use, unless some special averment could be made that valuable or other good consideration was given. Again, they would not suffer uses to be raised to persons named in the deed, if they were not within the considerations that had effect with regard to others. Thus, where Lord Paget covenanted, in consideration of blood, payment of his debts, and discharge of his funeral expenses, to stand seized to the use of *B.* during the life of the said Lord Paget; and after his death to the use of *D.* for twenty-four years, for payment of his

¹ 12 and 13 Eliz. Dyer, 296, 22.

² Poph., 47.

³ 2 Anderson, 64.

⁴ Dyer, *ibid.*

debts and funeral expenses; and after the end of that term to the use of his eldest son in tail, it was adjudged that the term was void, because it wanted a good consideration. For *D.* not being executor, and so not liable to the payment of debts, he was not privy to the consideration in the deed.¹ Where a person covenanted, in consideration of blood, to stand seized to the use of himself and the heirs-male of his body, with remainders over to his brothers, and remainder in fee to the queen, it was held, in *Wiseman's* case, that the queen took no estate, because she was not within the consideration mentioned.²

It was no uncommon thing for a deed conveying uses to have a proviso, enabling the maker of the estate to *revoke* the present disposition thereof, and declare a new limitation of the uses. This was an improvement on this new method of ordering property, and seems to have first been attempted in the beginning of the present reign; for there is no question in our books upon these deeds of revocation till past the middle of this reign, and those are all upon deeds made a very few years before. One of the first instances of any debate upon this new device is *Albany's* case, which was decided in the 28th of the queen. A man there had enfeoffed certain persons to the use of himself for life, with remainder over, in which there was a clause, providing, "that if *A.* died without issue male, *it should be lawful for him, at all times, at his pleasure, during his life, by deed indented to be sealed and delivered in the presence of four credible witnesses, to alter, change, determine, diminish, or amplify any of the uses limited in the said feoffment.*" These were the terms on which this power of revocation was usually reserved. The feoffor after this made a feoffment to other uses, and after that he made a deed in which he renounced to the feoffees, and *cestui que use* in the first deed, the power of revocation he had after the death of *A.*; he therefore *released* to them the said proviso and covenant, and further granted to them that the said power and authority should be null and void, which was putting it in as full a way as it could be worded. After argument upon the effect of the feoffment, it was resolved by Wray, chief-justice, after conference with Anderson and other justices, that a power to revoke as

Provisos;
revocations.

¹ In the Rector of Cheddington's Case, 1 Rep., 154.

² Wiseman's Case, 2 Rep., 15.

well as to limit new uses may be extinguished by a fine or feoffment; and he was inclined to think that the release also entirely extinguished the power; but at length the court agreed, that if the power of revocation had been present, as the provisos of revocation usually were, it might have been extinguished by a *release* made by him who had the power to any who had an estate of freehold in the land, in possession, reversion, or remainder; and so the estates which were before defeasible by the proviso would by such release become absolute. When this second deed could no longer be effective as a release, they argued it as a *defeasance*, and the whole court agreed that it was; and that it was reasonable that the proviso might be annulled by the same parties as were concerned in the making, and in the benefit of it; they therefore determined that the above was a *defeasance*, which defeated and annulled as well the covenant which created the power as the power itself.¹ It is evident from the report of this case that the whole of this was a new topic in the courts, the arguments being founded on the analogy of some old common-law cases of release of covenants, conditions, warranties, and the like.

In all these cases persons were held to a strict adherence to the terms of their deeds. In *Digge's* case, the proviso was, to make the revocation "by deed indented to be enrolled in any of the queen's courts." The person authorized made the revocation, but expressed in the deed that it should be enrolled in the Chancery; instead of which it was enrolled in the Common Pleas; and then he levies a fine, and after that the deed was enrolled in Chancery, as it should have been at first. Upon this, it was the opinion of the court, that the deed was not a perfect revocation till it was enrolled; for notwithstanding the proviso of revocation would be satisfied by an enrolment in *any* of the queen's courts; yet, as the deed of revocation limits the revocation to take effect after the enrolment in Chancery, that must be complied with before it can be said to be complete; and then, consistently with the resolution in *Albany's* case, they determined that the fine, coming before the revocation, wholly extinguished the power of making it.

The court, in this argument, came to several resolutions

¹ *Albany's Case*, 1 Rep., 110.

on the nature of these revocations. They confirmed what was said concerning a release in *Albany's* case. But Popham, chief-justice, said, if a feoffment was made by *A.* to certain uses, with proviso, that if *B.* shall revoke the uses should cease, there *B.* could not release the power. They resolved, that other uses might be limited or raised by the same conveyance which revoked the ancient one; for inasmuch as the ancient uses ceased *ipso facto* by the revocation, with claim, entry, or other act, the law will adjudge a priority of the operation of one and the same deed; so that it will be first a revocation of the old, and then a limitation of the new. They also held that, in this case, where the proviso was to revoke, "*at any time during his life,*" he might revoke part at one time, and the residue at another, till he had revoked all; but he could revoke one part only once, unless he had a new power of revocation annexed to the uses newly limited.¹

The attainder of Sir Francis Englefield gave occasion to a very singular question upon a revocation. He had covenanted to stand seized to the use of himself for life, remainder to his nephew in tail, remainder to himself in fee; and because he did not think it convenient that this settlement should remain absolutely in his nephew, who was then young, and his *proof* not yet seen, it was provided that if the uncle, by himself, or by any other, during his natural life, deliver or offer to the nephew a gold ring, to the intent to make void the uses, that then they should be void. This deed was made in the 18th of the queen, and in the 26th Sir Francis was outlawed for treason. And it became a question whether this was not such a condition as should be given to the queen by stat. 33 Henry VIII., c. 20. In the 31st year, letters-patent had issued to two persons, authorizing them to make a tender of a ring to the nephew, which they accordingly did, and read to him the patent, but he refused it: all this being certified into the exchequer, it came on to be argued on an information of intrusion. It was objected on the part of the nephew: 1st, That this was a condition annexed to Sir Francis with such inseparable privity, that it cannot be given to another, as it depended on his opinion of the young man, whether thought worthy to retain the estate

¹ 42 Eliz. Digge's Case, 1 Rep., 173.

intended him or not: 2d, They said, by the 33d Henry VIII., only conditions separable, and such as might be performed by others, were given to the king: 3d, They said, that though the benefit of the condition might, perhaps, be given to the king, yet the performance—that is, the tender of the ring—must be by the covenantor only.

To this it was answered, and agreed by the whole court, as to the first two objections, that the whole force and effect of the condition consisted in the tender of the ring; and as to the cause and intention of the covenantor, which induced him to reserve the same power as a bridle in his own hands; that, they said, was no part of the proviso, but a *flourish*, as the chief-baron called it, and preamble; for nothing was part of the condition but what came after the proviso, and that was the tender of the ring. And as to that, the distinction above made was admitted by the whole court, between conditions personal and individual, which could not be performed by any other, and those which were not so inseparably annexed to the person, but that they might be performed by another. Thus, they said, it had been resolved in the case of the *Duke of Norfolk*, who in 11 Elizabeth conveyed his lands to the use of himself for life, and afterwards to the use of his eldest son, Philip, Earl of Arundel, in tail, with divers remainders over; with this proviso, that he might alter and revoke the use, upon signifying his intention, *in writing, under his proper hand and seal, and subscribed by three credible witnesses*. The duke being attainted of treason, it was held this condition was not given to the queen by the statute, because the performance of it was personal and inseparably annexed to his person, as none could signify the duke's mind under his hand but the duke himself. And, upon this point, all the lands so settled were saved from forfeiture. But, in the present case, they said, any other person might tender the ring as well as Sir Francis, the same as in the payment of money, delivering gilt spurs, and the like. Then, as to the third point, they said, when the statute gives the condition to the king, it gives the performance also; for it puts the king in the place of the person attainted.

It is said, that in the argument many cases were adduced of persons attainted of treason who had power of revocation; and upon full consideration and comparison of them, the court gave judgment for the queen. The counsel, it is

said, were very dissatisfied with this decision, considering the condition as inseparably annexed to the person of Sir Francis, and they advised a writ of error. But, in the next parliament, which was the 35th Elizabeth, a special act was made to establish the forfeiture.¹ So little confidence had they that the point might be readily admitted for general law, which many lords were, perhaps, by the terms of their settlements, interested in, and which, perhaps, they might think they weakened instead of confirming by a special statute against an obnoxious offender and an outlaw.

Another instance, in which the crown felt an interest arising from these revocations, was where a fine was due from a tenant *in capite* for alienation. The Viscount Montague had obtained a license to alien to *A.* and *B.*: he afterwards covenanted with *A.* and *B.* that they should recover certain lands against him to certain uses, with a power to revoke those uses and declare others, by any writing, during his life, or by his last will, and that the recoverors should stand seized to the new uses. By his last will he revoked the uses, and declared new ones; and it was resolved by the judges that, in the first place, no fine was due for the estate executed in the *cestui que use* by the statute; and, secondly, that none was due for those newly declared in the will. For notwithstanding the king's tenant was altered by these new limitations, yet there being a license to alien to the recoverors was enough, for all the uses arose out of their estate.²

Sometimes these *provisos* did not give authority to revoke the whole of the settlement, but only part of it, and that for particular purposes: these were *provisos* which have since been better known by the name of *powers*; and certain restrictions were imposed on them, similar to those by which the raising of the original uses was governed. *Mildway's* case, in 24th of the queen, gave occasion to the nature of *powers* being better explained. A person there covenanted, in consideration of blood, and other good and just considerations, to stand seized to the use of himself for life, with several limitations, by way of portion to his daughters, and their husbands in tail; to which was added this *proviso*: that he should be at liberty, by will, in writing, to limit any part of the land to any one for life, lives, or

¹ Sir Francis Englefield's Case, 7 Rep., 11.

² 43 Eliz., the Viscount Montague's Case, 6 Rep., 27.

years, for payment of debts or legacies, preferment of servants, or any *other* reasonable consideration as to him should seem good; and all persons seized should stand seized thereof to such uses as he should so appoint by his will. In pursuance of this power, the covenantor did, by his will, give a great part of that which had been before limited, for a portion to two of his daughters, for the advancement of another named Plyff and her husband, and the heirs of her body, for one thousand years, without reservation of any rent. And, after long argument, it was resolved by all the judges that where uses are raised on consideration of blood, etc., and a proviso is added that the covenantor, for divers good considerations, may make leases for years, the covenantor cannot make leases for years to any of his blood (much less to any other person), because the power to make leases for years was void when the indenture was sealed; for the covenant upon such general consideration cannot raise the use; and no particular averment could in this case be admitted, because his intent was as general as the consideration was, namely, to demise to any one whom he pleased. But if it was upon a feoffment, fine, or recovery, there, as no consideration was necessary to raise the uses, it would be different. Again, in the present case, the power to make estates would defeat or encumber those already made on good consideration. Further, they held, that *other* consideration must mean other than the advancement of a daughter, which was mentioned before. And, further, they held the term for one thousand years to be against the intent of the parties and the words of the proviso; for the design being to provide for all the daughters, this term tended to encumber and frustrate the portions already given.¹

Whoever compares the pleadings of this reign with those of the two former, and of Henry VII. and Henry VIII., will not find any very material difference (a). The formal part of pleading was much ancients

Pleading.

(a) The great object of pleading was recognized to be to elicit the real question in controversy between the parties, either by the agreement of the parties to an issue of fact, or by a decision upon demurrer as to what the issue ought to be. And this was the reason why pleading, which appeared to be evasive, was regarded with such dislike, and was always held bad. Thus, for instance, where the plaintiff complained that the defendant warranted 300 ewes to be sound, and worth £9 per score, and sold them to the

¹ 4 Rep., 175.

than any of those reigns; and the most approved style had been settled either before or during that time, so that

plaintiff for that price, knowing them not to be sound nor worth that price, one-third of them being rotten, and the other two-thirds worth much less, and the defendant pleaded that they were sound, and well worth that price, and might have been sold for that price, the plea was held bad, as it said nothing as to the warranty (*Redhead v. Harper*, *Yelv.*, 114). A plea is for two purposes, to force the plaintiff to make a replication, and compel him to come to an issue; and therefore it is not necessary to show everything certainly in a plea, for perhaps the issue will not be joined upon the plea, but upon the replication (*Saunders and Coltherst v. Bejustin*, *Plowd.*, 28); for which reason a plea is good if it be certain to a common intent. Thus where in an action to try title the plaintiff had taken issue on a point not the true point in the case, and the parties went to trial, and it was found against him, and he moved in arrest of judgment, the court said that though the proper issue had not been taken, they could not interfere now, for the parties had agreed to doubt nothing but the matter denied, and that doubt was resolved by the verdict (*Pigot v. Pigot*, *Yelv.*, 54). And so where a party denied one of two matters alleged on the other side, and it was disproved, the other was not allowed then to rely on the other matter, for by the plea he hath not rested upon that, but hath relinquished it (*Therkettle v. Reeve*, *Cro. Eliz.*, 111). Thus where an action was on a bond, the condition of which was that the defendant should perform the covenants in a deed, one of which was, that he should let the plaintiff come and see if repairs were made of a house he had let to the defendant, and the defendant pleaded that the legal estate and reversion had become vested in and before any breach, which the plaintiff denied, and was found against the defendant, who then objected that the plaintiff had not shown any breach of the covenant by himself; but the court said that he need not in this case, for the defendant, by his pleading, had obliged the plaintiff to answer to the particular point tendered, and the plaintiff could go no further (*Guy v. Jeffrey*, *Yelv.*, 78). Thus, in the above case, it was said it is not like the case where, in an action on a bond to perform an award, the defendant serves the award. There the plaintiff must set it forth, and assign a breach; but in such a case, if the defendant pleads a release, whereby he offers a special point in issue, here it is sufficient for the plaintiff to answer the release, or other special matter alleged by the defendant, without assigning any breach (*Ibid.*, 79). Thus where the plaintiff declared, that in consideration he would marry the defendant's niece, the defendant undertook to give him as much in marriage with his niece as he had before agreed to give with her to one Jarvis, viz., £1000, and the defendant denied the promise, and it was found against him, and damages, £1000, the court refused to arrest the judgment for an objection that the declaration did not state with whom the defendant had agreed to give Jarvis £1000, for it was beside the promise of the defendant, which was the principal cause of action, and therefore it was sufficient to set forth the other matters generally; and if the defendant had pleaded that he had not agreed to give Jarvis £1000, then might the plaintiff soon enough, by way of replication, make the agreement certain with whom it was made, and in such other circumstances; but the declaration was good without such certainty at first (*Alsop v. Sitwell*, *Yelv.*, 18). Thus where the defendant had sold land to the plaintiff, supposed to be mortgaged to one Smith, and had given the plaintiff a bond, to be forfeited unless the mortgage was duly redeemed, and the plaintiff sued on the bond, and the defendant chose to deny that the land was mortgaged, and on that issue was taken, and it was found that it was, and the defendant then moved an arrest of judgment that this was not the right issue, for that

in the actions mostly in use there was little room left for improvement. *Debt, detinue, trespass, replevin, covenant*, all these being old remedies, their pleading was long ago debated and agreed upon.

But actions upon the case were of a later date, the constitution of which had not been sufficiently experienced, nor the power and direction they would take, and were capable of, fully comprehended. It was natural, therefore, that the pleading in these new actions should be as yet fluctuating and various.

The answer given to declarations in case, whether those that were grounded on a *contract* or *tort*, were sometimes special matter, concluding with a traverse or a kind of general issue,¹ as was stated to have been the practice in the preceding reigns; but more frequently the general plea of *non assumpsit* and *not guilty*.²

As to the action of *assumpsit*, so closely did they adhere to the supposition of an *actual* promise, that where the jury found the promise on a different day from that laid, it was held not to support the declaration.³ Again, as it was made a substitute for the action of *debt*, they resolved it should, in one instance, be tied down to the rule which governed in that; for where the declaration was for £50, and a verdict was for £47, and as to the residue, the jury found that he did not promise, the verdict was set aside; *because* damages were assessed to a lesser amount than the sum alleged to be due.⁴

The old pleading in *trover* still continued, but drew from the courts some opinions which naturally led to certain alterations. In 37 Elizabeth⁵ there are two actions of *trover*; in one, a sheriff was defendant, who *justified* under an execution; in the other, the defendant justified distraining damage feasant, and set forth all the special

it ought to have been whether the mortgage was redeemed; the court said that the defendant had offered an issue that the land was not mortgaged, which was the particular point to which the plaintiff had to answer, and he had answered to it, and the parties were at issue; and it was not to be presumed, as the defendant had not alleged, that the mortgage had been redeemed, that if so, the defendant should have stated it; that it was his own fault if he had rested his case on a false issue, and that the plaintiff could not know what was the truth, as the matter lay in the knowledge of the defendant (*Bailey v. Taylor, Yelv., 25*).

¹ Cro. Eliz., 147, 634, *et passim*. ² Ibid., 130, 625, 923. ³ Cro. Eliz.

⁴ Bagnall and Sacheverell, Cro. Eliz., 292.

⁵ Cro. Eliz., 433, 434, and 436.

matter; the pleas in both cases conclude *absque hoc*, that he converted them *aliter vel alio modo*. There were demurrers to them; and the plea in the first action was held bad, *principally*¹ because there was no conversion confessed, as there should have been, conformably with the traverse; so that the court admitted the substance of such a plea to be good, if that requisite had been complied with. But, in the latter case, they said, the plea amounted to the general issue, and it should have been not guilty.² However, notwithstanding these opinions had occasionally dropped from the bench, the practice continued all through this reign in all actions of trover to plead such special matter as amounted to a justification of the defendant, and so conclude to the court or with a traverse in the manner before stated.³ Both these methods were again allowed as good, the former in 38 Elizabeth, the latter in 39 Elizabeth.⁴ Such repeated declarations in favor of these pleas could leave no doubt of their sufficiency; and though the general issue had been, as we have seen, as authoritatively declared good, the prevailing habit was to bring everything to the judgment of the court by these justifications, in preference to the trial by the laygents; to which they would be subject by the plea of not guilty.

With these and some few other particular exceptions, it may be pronounced, that the general cast of learning in the days of Queen Elizabeth comes within the bulk of that kind of law which is now in use (*a*). The long period

(a) So it may be said of many heads of our old law. To use the language of Lord Hale (in his Preface to Rolle's "Abridgment"): "It cannot be supposed that common laws can be wholly exempt from the common fate of human things, which must needs be subject to particular defects and mutabilities; time and experience, as it hath given it the perfection it hath, so it must and will advance and improve it. But more particularly the mutations that have been in this kind have not been so much in the law as in the subject-matter of it; the great wisdom of parliament hath taken off or abridged many of the titles about which it was conversant; usage and disusage have antiquated others, and the various accessions and alterations in point of commerce and dealing have rendered some proceedings that were anciently less in use to be more useful, and some that were anciently useful to be now less so. And it shall not be altogether impertinent to give some instances here of several great titles in the law, which are at this day in a great measure antiquated, and some that are much abridged and reduced to a very narrow compass and use:—1. Tenures by knight-service and their appendices—wards, value and forfeiture of marriage of the ward; escuage, relief,

¹ Cro. Eliz., 434.

³ Coke's Entries, 40 b., 41.

² Ibid., 435.

⁴ 38 Eliz. Cro. Eliz., 485; 39 Eliz. Cro. Eliz., 554.

of this reign gave sufficient opportunity for the discussion of almost every legal question; and the learning of former

aide pur file marier, et faire fils chevalier, primer seisin, livery, offices *post mortem*, traverses, interpleader, and *monstrans de droit* incident thereto; the several writs of rights of ward, ravishment of ward, *valore maritagii*, *duplicii valore maritagii*, and some other appendices of this nature, made up several great titles in our law titles, and took up much of the business of the old and latter law-books, all, or the greatest part whereof, is now pared off, and become unuseful by the late act for the alteration of tenures. 2. Villenage, and the several appendices thereof, viz., enfranchisement, writs *de nativo habendo* and *libertate probanda*, and the pleadings and trials relating thereto, were great titles in the old books, but now antiquated by time; we have rarely heard of any cases of villenage since *Crouch's* case in my Lord Dyer. 3. The titles of profession, deraignment, and the several titles relating thereto, made considerable titles in the old Year-Books, but are now wholly antiquated by the statutes of 27 and 31 Henry VIII. (dissolution of religious houses, and other statutes pursuant thereunto). 4. The title of dower, and its several kinds, was a large title of the common law, and though that title be not wholly abrogated or out of use, yet it is grown much narrower, especially in relation to great estates, by the common use of jointures, pursuant to the statute of 27 Henry VIII. 5. The title of descents to take away entries and continual claims is very much abridged in point of use and experience by the stat. 32 Henry VIII., c. 33. 6. The title of attornment was a difficult and yet great title, with its appendices *quid juris clamat, quem redditum reddit, per quæ servitia*. But it is much out of use, and new expedients substituted in lieu thereof, viz., by fines to uses, by bargains and sales for a term, and releases, and by deeds enrolled according to the stat. 27 Henry VIII.; and by those also the difficulties in execution of estates by livery and seisin, yea, and many of the curiosities of some kinds of releases and confirmations are commonly supplied. 7. The titles of discontinuance and remitter are great and large titles, and indeed full of curious learning; yet these are in a great measure narrowed by divers acts of parliament. Some assurances that at common law were discontinuances, are now made bars, as fines with proclamations by the stats. 4 Henry VII., and 32 Henry VIII., as to the issue in tail, though still they continue discontinuances in some cases to him in the remainder or reversion. Again, some that were discontinuances at common law, have since, by act of parliament, lost that effect, as in cases of jointresses, and husband seized in right of his wife, by stat. 11 Henry VII., c. 20; in case of bishops, by stat. 1 Elizabeth; in case of other ecclesiastical persons, by stat. 13 Elizabeth. 8. The remedy by assizes and several forms and proceedings relating thereto were great titles in the Year-Books; and although the law is not altered in relation to them, yet use and common practice have in a great measure antiquated the use of them in recovering possession, and the remedy by *ejectione firmæ* used instead thereof, so that rarely is any assize brought unless for recovering possession of offices. 9. Real actions, as writs of right, writs of entry, etc., and their several appendices, as *grand cape*, *petit cape*, *saver default*, *resceit*, *view*, *aide prayer*, *voucher*, *counter plea of voucher or of warranty*, *recovery in value*, were several great titles in the Year-Books, but now much out of use; for in most cases at this day, the entry of him that hath the right being lawful, men choose to recover their possession by *ejectione firmæ*, only in common recoveries the form of such real actions is preserved, and sometimes, though rarely, a writ of dower or formedon, because, ordinarily, where an entail is suspected a common recovery is had. 10. Ley-gager, a great title in the Year-Books, but now by action upon the case being commonly brought for debts upon

times being laid open to the world by the late publications, the whole of the law seems to have undergone a

simple contract, that title comes rarely in use unless in actions of debt for a by-law or a fine, or amercement in a court-baron. 11. *Quod permittat*, and assizes, for common ways, etc., *secta ad nolendum*, and assizes of nuisances, are much turned into trespasses and actions upon the case. 12. Garnishment and interpleader were large titles at common law, but now much out of use, for that actions of detinue are much turned into actions upon the case *sur trover* and *convernon*. 13. The learning of avowries is in a great measure abridged by stat. 21 Henry VIII., and intricacies of process in replevin, *retorno habendo*, etc., much remedied in case of distress for rents, by the late act (17 Chas. II.). Many more instances of this nature might be given, but these may serve to let us see that process of time much changeth the course and practice of law and the reason of such changes. And as time, and experience, and use, and some acts of parliament have abridged some and antiquated other titles, so they have substituted or enlarged other titles, as, for instance, action on the case, devises, *ejectione firme*, election, so divers others are now grown greater titles than formerly." Many heads or branches of law may be said to have arisen about this time, by reason of the altered circumstances of the age; and it is curious to observe how the growth of wealth, the advance of civilization, the increase of population, and the consequent extension of cities and development of commerce, raised new questions and gave occasion for novel applications of legal principles. One remarkable illustration of this is afforded by what appears to have been the earliest cases on the subject of lights, which occurred in or soon after the present reign. Thus, for instance, in one of these cases, towards the end of the reign, a custom alleged in a city to stop lights by building a new foundation, was adjudged void;* and in another case, shortly after the close of this reign,† the plaintiff declared that he was possessed of a house in London by lease, in which house there had been three lights from time whereof the memory of man was not to the contrary, by which wholesome air had been received; and that the defendant was possessed of a lease of a void piece of land or yard, which was contiguous and adjoining to the plaintiff's house, on that side of it where the three lights were, which lights were towards the defendant's yard, and so have been of ancient time, and that the defendant had built a new house so much on the void piece of land as that he had totally obscured the plaintiff's ancient lights. The defendant pleaded a custom of London, which warrants the rebuilding of any house on the same foundation where the ancient house stood, in height, at the pleasure of the party; and that it is lawful by the custom, though by the rebuilding his neighbor's lights are stopped (unless there be covenant to the contrary), and so justifies the rebuilding of his house on the same foundation higher than before, whereby the plaintiff's lights were stopped; and it was held that the custom pleaded was a good custom; for it might arise as a lawful commencement or reason in cities or boroughs; for if a tradesman has settled himself in a commodious part of the city, where he increases in his trade, and his house becomes too small for his company, he may build it higher, for his better habitation; and it is well allowable, for it tends to the peopling of cities, and to the encouragement of tradesmen in such places. But the custom of a city which enables men to build on a void piece of land where there was no house before, and thereby to stop up his neighbor's lights, was held void; for by that means men may lose all their lights which in any way come into their houses, if they may be environed on every side

* *Mosley v. Ball*, 39 Elizabeth, adjudged on a custom of York, cited in *Yelverton*, 216.

† *Hughes v. Keme*, *Yelv.'s Reps.*, 215.

reconsideration as it were; and those parts which were then mostly in use were settled upon principle, and so de-

with new houses, and, by this stratagem, live in *tenebris*, which the law will not allow. And judgment was given against the defendant, by reason he did not answer the offence laid to his charge, which was the building on the void piece of land, and by that means stopping the plaintiff's lights; for the defendant was justified only by building on the old foundations, and thereby stopping the plaintiff's lights, which was not, it was said, the matter wherewith the plaintiff charged him; that is to say, that the defendant by not denying admitted that he had not merely built on the old foundations higher than before, but also, in fact, upon the vacant ground, and by that new building had obscured the plaintiff's lights. It will be obvious that the case itself and the arguments to which it gave rise could not have arisen had not population largely increased and trade and traffic in consequence much advanced, and the building in cities and towns greatly extended. There is another case reported about the same time, in which the plaintiff complained of the stopping of three lights by a building in the yard of the defendant, who justified the total stopping of two of the lights by reason of a custom of London (probably the one above mentioned), and the stopping of the third in part, also by virtue of the custom; as to which latter part of his defence, it was held uncertain and untenable, as it only answered as to part of the third light, and so the plaintiff recovered (*Newhall v. Bomord, Yelverton*, 225). So in many other cases of deprivation or obstruction of some right acquired by use as to watercourse or the like. Actions on the case began to be brought very frequently in this reign. For example, actions by the owners of water-mills for diversion or obstruction of the streams which worked them. Questions relating to the right to the use of such things as light, and air, and running streams, and the like, which were originally *publici juris*, but might by long uses become appropriated, and made a species of property, began in this reign, from the causes before mentioned, to be of considerable importance, and to be greatly litigated, and numerous cases on such subjects are to be found in the law reports of the period, actions on the case having by this time become usually substituted in such cases for the old cumbrous real actions. Thus, for instance, in this reign was raised and determined in a court of error the great question, which must have been of immense importance at the time, and formed a kind of junction between the ancient rights and the modern, whether when any right had been originally annexed to buildings, such as mills, which had become in course of time ruinous and prostrated, so that they required to be rebuilt, the right was thereby lost? (*Luttrell's Case*, 4 *Coke's Rep.*, 80). There indeed the question was also raised, whether the right was lost if the nature of the holding was altered, or if ancient fulling-mills turned by water were pulled down, and corn-mills built in their places, was the old right to the running stream lost by reason of the change? It was held that it was not, and the principles laid down were of wide and general application. The mill, it was said, was the substance, and the owner might alter the nature of the mill as he pleased, provided no prejudice arose to the grantor, for the grant of the watercourse must have preceded the erection of the mill; and the grant being general for a water-mill, the grantee might alter it as he pleased. So, if a man had an old window to his hall, and afterwards converted the hall into a parlor, his neighbor could not stop the window. And as to the rebuilding, it was said that the most perdurable part of the building was the land itself on which it rested, and which preceded the mill, and to which the original grant must have been made (*Ibid.*, 88). So actions on the case for nuisances became common. If the nuisance was in its

livered down to succeeding times. To us, who view things in the retrospect, there seems to arise a new order of things

nature public, as a weir upon a river, there might be an indictment for maintaining it *ad nocumentum* of the public, and there could be judgment that it be abated; and this course began to be taken about this time, as appears from some reported cases (*Sir Edward Winter's Case*, *Yelv.*, 60), and was afterwards the course taken, as the old real actions became obsolete, for the abatement of nuisances (*Reg. v. Wigg*, 2 *Lord Raymond's Reps.*, 1163; *Rex v. Rosewell*, 2 *Salk.*, 459; *Rex v. Stoughton*, 2 *Strange*, 901). Where indeed the nuisance was temporary there need not be judgment to abate it (*Rex v. Papporean*, 2 *Stice*, 686), as every repetition of it would be punishable by a fresh fine; but if it were permanent in its nature, then the proper judgment on an indictment would be to abate it, or to inflict fine and imprisonment if it were not. Thus it was held in this reign that an action on the case did not lie by one freeholder against another for maintaining a bank on a brook whereby it overflowed the plaintiff's land; for it was said, if it were a nuisance (being a nuisance to the freehold), assize or *quod permittat* would be the proper remedy by which he would abate the nuisance; wherefore it was adjudged for the defendant (*Beswick v. Amden*, *Cro. Eliz.*, 520). Both these actions of assize of nuisance and *quod permittat* were out of use at the time the "Commentaries" were written; but as the party could not by action in the case abate the nuisance, but only recovered damages, it was necessary to have recourse either to the old remedies or to indictment, which latter, however, would not lie, except for a public nuisance (3 *Bl. Com.*, 222). Where indeed the action was not between freeholders, that is, where both parties were not freeholders, and the action was not for a nuisance annexed to the freehold, but for a merely temporary injury, as stopping a way, which might be permanent or temporary, the party had his election to sue in an action on the case or for damages, or by assize for abatement (*Alston v. Pamphyn*, *Cro. Eliz.*, 466). If an assize were brought, there was judgment to abate the nuisance; but the proceedings in real actions were slow; and it was found that the award of damages in actions on the case were in most cases equally efficacious, as fresh actions would lie for the continuance of the nuisance, and the process in actions on the case was much more speedy. There was one class of actions which came into vogue in this reign, entirely of a novel character, and the rise of which can be traced to the great religious revolution which had taken place. This was actions for slander, which, previous to that era, were unknown, slander being of spiritual cognizance, and dealt with in the ecclesiastical courts, by which slanderers were compelled to do public penance, and make public reparation. After the Reformation, the power of the church being so crippled, and the jurisdiction of the ecclesiastical courts so reduced, these cases ceased to be taken into the ecclesiastical courts, and actions grounded upon temporal damage were brought in the courts of law. This class of actions rose so suddenly, or multiplied so rapidly, that the law-books of the age are full of them. In one small volume of reports (*Yelverton's*) there are not less than nearly sixty cases of slander, and many of them are of the most unseemly and unsavory character. They multiplied indeed so enormously, that the courts did all they could to discourage them; and they held, for instance, that mere defamatory speaking, even although it did produce actual and special damage to the party slandered, was not actionable unless the slander was spoken *maliciously*; and that this was not satisfied by mere legal or constructive malice, which required some substantive actual malice be alleged and proved, is plain from the cases decided. Thus, where a woman sued for words imputing to her incontinence, whereby she had lost a marriage,

about this time, when the law took almost a new face. At this period are terminated in general our legal inquiries,

although she obtained a verdict, the court arrested the judgment because it was not alleged, and did not appear, that the words of slander were spoken maliciously, notwithstanding that the special damage thereupon was alleged and proved (*Brunsbv v. Buleptry, Yelv.*, 113). This seems to show that the mere allegation of slanderous language did not suffice to show that it was spoken maliciously, as it seems the same law must have been laid down had the words been such as would be accountable *per se* as imputing a crime, and all the precedents alleged the words to have been spoken maliciously. And in cases in which the words used implied a crime, the courts were astute to defeat the action by strict and almost strained constructions, such as would be put upon indictments in criminal or capital cases. Thus, where the action was in these words, "Thou art an arrant knave, for thou hast bought stolen swine, knowing them to be stolen," it was adjudged against the plaintiff, for the receipt or sale of goods stolen is not felony, nor makes an accessory, unless it be joined with the receipt or abetment of the felon himself; which, no doubt, was proved at the trial, although the court chose to suppose it might have been otherwise. "And in some cases it is lawful (they said) to receive stolen goods; as if the lord of a manor, who has *bona waivata*, meets with a suspicious person who has stolen goods, and stops the goods, and the party confesses them to have been stolen, and flies; in that case it is a receipt of stolen goods, knowing them to have been stolen, and yet it is not any slander if any one should say to him, 'You have taken stolen goods, knowing them to be stolen.'"^{*} This, however, would, it is manifest, depend upon the sense in which the words would be understood naturally by those who heard the words, and which again would depend upon whether they were aware of the circumstances being as suggested. And in such a case it is not likely that any jury would find for the plaintiff, as they did in the case in question, a fact quite forgotten by the court in their obvious anxiety to defeat the action. In another case, where the plaintiff, a widow, complained that the defendant had said, in the presence of others, "Thy father said thou hast murdered thy husband," although they rendered a verdict, yet judgment was arrested, because, it was said, "the words impute in themselves a slander, yet it is not expressly alleged in the declaration that the plaintiff's husband was dead at the time the words were spoken," as if this could have mattered, the imputation being that she had murdered him, and that of itself importing and conveying to the minds of the hearers that she had killed him, and as if, if it had appeared that he was still living, and known to be so, at the time the jury would have found for the plaintiff (*Boldroc v. Porter, Yelv. Reps.*, 22). It was laid down, that words of mere general abuse, as "rogue," "rascal," etc., were not actionable, "for they are not slanders, but sound only in disgrace" (*Heake v. Moulton, Yelv.*, 90), and that there must be some imputation of a specific crime or offence punishable by law, for such an imputation, it was said, showed malice in the defendant, and was a great injury to the plaintiff, thus indicating that there might be defamatory words, the evident effect of which being to inflict such serious injury that the speaking of them implied malice or intention to injure, which would be malice in a legal sense, and so sustain the action (*Newbyn v. Fassett, ibid.*, 152). Another remarkable feature of the age, as illustrated by the law reports, is the enormous increase of libel and slander, as to which the chief-justice said, that the judges had resolved that actions for slander should have no power, forasmuch in those days they more abounded than in times past, and the intemperance and malice of men in-

^{*} Dowson's Case, Yelverton's Reps., 5.

as few are at the pains of looking further back than the writings of this time, or examining very minutely into the mines where the lawyers of Queen Elizabeth's days dug for their learning. We are usually content with such portion of that ancient matter, and that shape in which we receive it from them, or even from writers of a later date; and a man is esteemed no superficial reader who has collected his knowledge from this source.

When we consider Queen Elizabeth's reign in this view, it becomes a very interesting period in the history of our jurisprudence. From hence the commencement of modern law may be dated. While the decisions of the earlier periods are looked into with diffidence, and a suspicion that they may have been overruled or explained away, we find those of this reign repeatedly quoted as incontrovertible and leading authorities: they are within the compass of the student's reading, and the reference of the man of business.

Before we enter on the criminal law of this reign, it will be proper to mention a court, whose authority, though established with a view to the ecclesiastical state, may be considered as a criminal jurisdiction of the most severe kind. This was the *Court of High Commission*.

The first statute of this reign had conferred on the queen the supremacy over the church in as ample a manner as it had been enjoyed by Henry VIII. and Edward VI.¹

creased. "In our books," says Lord Coke, "before this time, actions for slander were most rare" (4 *Coke's Reps.*, 15); but a glance at the law reports of this reign will show that they were most numerous. They had, in fact, enormously multiplied, so that this forms one of the most prominent features in the legal history of the reign. Another remarkable feature in it is the great increase of perjury, which led, Lord Coke says, to the devising of a new form of action in order to get rid of one in which the oath of the party interested was allowed. Among the means of arbitrary power possessed and employed by this sovereign were the Star Chamber and the high commission court. The Star Chamber, as already has been seen, existed under Henry VII., and was in that reign sanctioned by parliament. It possessed an unlimited discretionary power of fining, imprisoning, and inflicting corporal punishment, and its jurisdiction extended to all sorts of offences, contempts, and disorders that lay not within reach of the common law. The members of the court consisted of the privy council and the judges, men who all of them enjoyed their offices during pleasure. There needed but this one court to put an end to all regular and legal plans of liberty; for who durst set himself in opposition to the crown, or aspire to the character of being a patron of freedom, while exposed to this arbitrary jurisdiction? (*Hume*, vol. v., App. iii.)

¹ Stat. 1 Eliz., c. i., s. 17.

There is a clause in this act which empowers the queen, by letters-patent, to name and authorize, as often as she shall think meet, for such time ^{The court of high commission.} as she shall please, such person or persons, being natural born subjects, as she shall think fit to execute all jurisdiction concerning spiritual matters within the realm; and to visit, reform, redress, order, correct, and amend all errors, heresies, schisms, abuses, offences, contempts, enormities whatsoever, which belong to any ecclesiastical authority,¹ and as a restriction on the authority of such commissioners. It was provided by another clause of the same act,² that no matter shall be adjudged heresy but only such as has been so adjudged by the canonical scriptures, or by the first four general councils, or by any other general council wherein the same was declared heresy by the express and plain words of the canonical scriptures; or such as may hereafter be adjudged heresy by parliament with the assent of the convocation. So that charges of heresy were not left so much at large as they had been in the preceding reign. These were the powers given by the statute.

The first commission granted under the authority of this act was in 1559, when one was made for the province of Canterbury, and another for that of York (a). The

(a) The court of high commission was another jurisdiction still more terrible, both because the crime of heresy, of which it took cognizance, was more undefinable than any civil offence, and because its methods of inquisition were more contrary to all the most simple ideas of justice and equity. The fines and imprisonments imposed by the court were frequent. The deprivations and suspensions of the clergy for nonconformity were also numerous, and comprehended at one time the third of all the ecclesiastics of England (*Neale*, vol. i., p. 479). The queen, in a letter to the Archbishop of Canterbury, said expressly that no man should be suffered to decline either on the left or on the right hand from the drawn line limited by authority and by her laws and injunctions (*Munden*, p. 183). Sir J. Mackintosh observed: "If such power were conferred by it, the sovereign was absolute; if it was not conferred, Elizabeth set heresy above the law" (*Ibid.*). Lord Coke pronounced the commission contrary to law, and says that at a later period, when a similar commission was issued, a man slew a pursuivant, who with a warrant from the commissioners had entered and searched his house, and then he was discharged by the judges, on the ground that the warrant was illegal (4 *Just.*, 42 *Eliz.*). But that was near the close of the reign, when the people, so long estranged by such atrocious oppression, were growing rapidly ripe for revolt, and in the meantime, for a long series of years, the commissioners were exercising their jurisdiction by fines and imprisonments, ransacking the houses of the people by their pursui-

¹ Sect. 18.² *Ibid.*, 36.

preamble of the commission states, that the queen intended a general visitation of the whole kingdom; and,

vants, and their consciences by administering oaths (*Mack. Hist. Eng.*, vol. iii., c. 5). It is difficult to imagine a more shocking system of tyranny, a more dreadful reign of terror. During the reign of Elizabeth, so stern and terrible was the tyranny she exercised, no one durst call in question what was the real scope and effect of this statute, and whether, in particular, it authorized the court of high commission, with its arbitrary powers of fine and imprisonment. But in the reign of James I., the judges, at the instance of the courageous Coke, were emboldened to declare their views upon it. And when the archbishop cited, and relied upon this clause, coupled with the notorious fact that Edward VI. and Henry VIII. had issued such commissions, whence he urged, that by the above clause, the clause of restitution, the power was confirmed by parliament. Lord Coke answered that this was a great error, for that the very word restitution implied that it was to be understood of lawful jurisdiction and authority, and that the words, "heretofore lawfully exercised," plainly limited the clause (in which view he was confirmed by the judges); and moreover, he laid it down that the commissioners could not legally fine or imprison, even although they had constantly done so all through the reign of Elizabeth (12 *Coke*, 85). And this had indeed been judicially determined in the reign of James I., on a *habeas corpus*, issued at the instance of a person who had been imprisoned by order of the commissioners. And the court said that the commissioners had no power to imprison, and that though they had used for twenty years to do so without exception being taken, yet when it came before them judicially they ought to judge according to law (*Chancey's Case*, 12 *Coke*, 83). Nevertheless, the law officers of the crown, contrary to Coke's opinion, advised, upon consideration of certain precedents, in the reign of Elizabeth, that the high commissioners had authority even to issue the writ of *de heretico comburendo* upon conviction for heresy (*Writ De heretico comburendo*, 12 *Coke*, 93), whence it is to be inferred that such writs actually had issued in Elizabeth's reign. Nevertheless, it is stated by Lord Coke that the high commissioners committed parties for heresy, and that they had power to do so. For he says that they had committed certain persons for that they were vehemently suspected to be Brownists, *i. e.*, Independents, and they obtained a *habeas corpus*; but were remanded, because the high commissioners had power to commit for heresy (12 *Coke's Reps.*, 40). But in *Lady Throgmorton's* case it was held, that parties could not be cited before the commissioners for any offence for which there was remedy by the common law; and that, on the other hand, they could not take cognizance of a mere private act, such as causing reparation between husband and wife, not amounting to an enormous offence within the meaning of the act (*Ibid.*), so that, one way or another, the jurisdiction of the court was a good deal restrained. It is to be observed, that almost at the end of the reign it was laid down by the judges that, although at common law convocation could commit a heretic, and even a bishop could do so *pro salute animæ*, and for the imposition of penance, the bishops could not imprison, or impose any corporal punishment, except by statutes now repealed. The makers of the act of 1 Elizabeth were, Lord Coke says, in doubt what should be adjudged heresy; and therefore, if any person were charged with heresy before the high commissioners, they had no authority to judge any matter to be heresy but as defined in the statute, which indeed left it all open, except as to any heresy which might be declared by any act of parliament. To this day, said Lord Coke, the diocesan hath jurisdiction of heresy, and so it hath been used all through Queen Elizabeth's reign; but the diocesan could not (the old statutes being repealed) imprison a man for heresy, and

therefore, she empowered the commissioners, or any two of them, to examine the true state of all churches, to sus-

at this day, he adds, no one could be accused of heresy before any temporal judge. Just before the close of the reign of Elizabeth, indeed, the legality of the proceedings of the commissioners was tested in a striking manner. A pursuivant was sent by the commissioners to arrest the body of a man to appear before them, and in resistance of the arrest, the pursuivant was killed. And if this was murder or not was doubted; and this depended upon the validity of the power and authority of the pursuivant: for if his authority was lawful, then killing an officer of justice in execution of his office was murder: and advisement was taken until the next assizes; and upon conference at the next assize, it was resolved that the arrest was tortuous, and by consequence that it was not murder (*Simpson's Case*, before the judges of assize in Northamptonshire; 42 *Eliz.*, stated by Lord Coke in the *High Commission Case*, 12 *Coke's Reps.*, 50). There it was held that the commissioners could not send a pursuivant to arrest any person subject to their jurisdiction: but ought to proceed according to civil law by citation. It appears that the judges did what they could, or at all events what they durst, to restrain the exercise of this novel and illegal jurisdiction. For Lord Coke, in his reports published in the next reign, says that there was a case reported by Lord Dyer, but not printed, which occurred in the tenth year of the queen, and in which a party had been committed to the fleet by the high commissioners in a cause ecclesiastical: for that he had been at mass and refused to swear to certain articles to be proposed to him, and it was held, that though in such case ecclesiastical jurisdiction was served by the statute 10 Elizabeth, yet they ought not in such case to examine him upon oath, and thereupon he was delivered by the court upon the *habeas corpus* (12 *Coke*, 27). And so in another case (18 *Eliz.*, *Dyer's Reps.*, 175), because they could not imprison. In the next reign it was held, that the construction of the statute, and the commission under it, belonged to the courts of common law, as the authority and power were given by act of parliament; and they, accordingly, proceeded to restrain it. By that act, it was said, the commissioners had power to exercise all jurisdiction, spiritual and ecclesiastical, and to visit and reform all heresies, etc., which by any spiritual or ecclesiastical power could lawfully be so reformed: so that, it was said, these branches of the statute limited the jurisdiction and what offences should be within it, and only such offences could lawfully be reformed by the ecclesiastical law. But it was held that the act did not give the queen power by her letters-patent to alter the proceedings of the ecclesiastical law, or give to her absolute power to prosecute what proceedings concerning the lands, goods, or bodies of her subjects, should be taken. And if any other construction should be put, it was said, it would be full of great peril and inconvenience, for then not only imprisonment of body, but confiscation and some corporal punishment might be imposed for heresy, schism, etc.; and power might be given them to burn any man for heresy. But all this power had been exercised throughout the long reign of Elizabeth, and it was only on her death the judges durst say it was illegal. A question arose upon this point early in the next reign — whether the high commissioners in ecclesiastical causes could imprison men? — and it was held that they could not (12 *Coke's Reps.*, 20). It was agreed by all the judges, that before the statute 1 Elizabeth, c. 1, the king might have granted a commission to hear and determine ecclesiastical causes; which, however, the king certainly could not have done prior to the statutes of Henry VIII., and never had done; but that notwithstanding any clause in their commission, the commissioners ought to proceed according to the ecclesiastical law allowed within the realm, for he could not alter his temporal

pend or deprive such clergymen as were unworthy, and to put others into their places; to proceed against those who were obstinate by imprisonment, church censures, or any other legal way: they were to reserve pensions for such as would not continue in their benefices, but quitted them by voluntary resignation; to examine all those who were imprisoned on account of religion, and to discharge them, and to restore all such to their benefices as had been unlawfully turned out in the late reigns; which last two directions were in favor of those who still lay under the weight of Mary's prosecution.

This was the first high commission: it differs from the like authority which had been delegated, in the reign of Henry VIII. to Cromwell, with the title of vicar-general, inasmuch as it was given to more than one person, whom

or ecclesiastical laws by grant or commission; and they could not have punished any delinquent by fine or imprisonment, unless they had authority to do so by act of parliament. The question, therefore, turned upon the act of Elizabeth, and was so determined. And, in the reign of James I., the Archbishop of Canterbury having laid it down that when the question was ecclesiastical, as in a matter within the cognizance of the ecclesiastical judges, or in any other case in which there was not express authority in law, the king himself might decide it in person; to which Lord Coke, in the name of the judges, only objected to this extent, that the king in his own person could not adjudge any cause either criminal, as treason or felony, or civil, concerning the inheritance or goods of a party; but that this ought to be adjudged in some court of justice according to law (*Prohibitions del Roy*, 12 Coke, 641). This, however, left the proposition of the archbishop quite untouched as regarded the mere definition of doctrine, faith, or worship, in which it was deemed that the crown was absolute save when restrained by statute. The high commission court established by the above act was abolished by the 11 Charles I., c. xi., and the revival of the high commission court, or any similar court, is provided against by the 13 Charles II., st. 1, c. xii., and William and Mary, sep. 2, c. ii. "The authorities intermediate in date," it has been said, "state the law as it was in force under the former of these statutes, and which ceased to be in force on the passing of the latter" (*Opinions of Sir R. Palmer, Sir J. D. Coleridge, and Dr. Deane, April 19, 1869*). These distinguished men appear to have implied that the judicial authorities, as to the authority of the crown by virtue of the supremacy, are to be either disregarded, or deemed to be overruled by the express terms of the statutes. They, however, appear to have overlooked that the statutes only provided against the re-establishment of any court with the like power, jurisdiction, and authority as the high commission court, which was arbitrary (*vide Hallam, Const. Hist.*, vol. iii., c. xiv., xv.), and therefore this statute would be no obstacle to the issuing of ecclesiastical commissions to try and determine any ecclesiastical question, provided it did not interfere with any established ecclesiastical tribunal, as it must do if it exercise jurisdiction over matters within the realm: because there the ecclesiastical courts and the judicial committee of the Privy Council, the supreme ecclesiastical tribunal, exercise jurisdiction by statute.

it was not thought proper again to trust with such ample powers. This commission was directed to persons both clergy and lay.¹ It was of a confined nature, designed merely to assist in completing the Reformation, and was restrained to the particular objects therein specified. However, exception was taken to this commission at the time; the principal complaint was, that the queen should give the visitors authority to proceed by ecclesiastical censures; which, considering some of them were laymen, seemed a great stretch of supremacy. This, on the other hand, was defended, by alleging that this was no more than the lay chancellor ordinarily did in the ecclesiastical courts, which Bishop Burnet thinks was only making one abuse an excuse for another.²

This commission expired with the occasion of it. From the year 1568, the Puritans had grown to a great number, and gave much uneasiness to the queen, who was always as jealous of the sectaries as of the Romanists. Archbishop Grindal, who had a bias this way, had so dissatisfied the queen by his remissness in suppressing their meetings, that he was proceeded against in the Star Chamber, and sequestered from his archiepiscopal functions. When Whitgift succeeded him, he informed the queen that the spiritual authority of the bishops was not sufficient without the assistance of the crown. By his advice, therefore, a new commission was issued, appointing forty-four commissioners, of whom twelve only were ecclesiastics: three of the persons appointed constituted a *quorum*.

The jurisdiction of this new ecclesiastical commission extended over all the kingdom, and over all descriptions of men. The commissioners were empowered to visit and reform all errors, heresies, and schisms, in the terms and to the extent prescribed by the statute, and they were directed to make inquiry by juries and witnesses, *and all other means and ways which they could devise*; which seems to authorize every inquisitorial power, the rack, the torture, and imprisonment.

Besides, they were not confined to matters merely spiritual; but they had also power to punish incest, adultery, fornication, with all misbehaviors and disorders in marriage. Thus, with an unlimited authority to inquire,

¹ 2 Burn. Reform., 358.

² Ibid., 371.

without prohibition or appeal, in spirituals and concerning morals and behavior, by a summary method of trial, and with their own discretion only to restrain them, in punishing by fine and imprisonment, this court had all the appearance of an inquisition.¹ This court and the Star Chamber constituted two engines of arbitrary power, which, perhaps, never were surpassed by any contrivance of government to keep the people in continual awe of the sovereign authority.

Criminal law.

The criminal law was reduced to a greater certainty by several decisions in this reign.

Murder and homicide.

The crime of murder and of homicide was discussed in many points of view, and settled by frequent decisions. In the 15th of the queen, a remarkable case happened at Warwick assizes. One Saunders, wanting to get rid of his wife, had, by the advice of Archer, mixed arsenic in a roasted apple, and gave it to her; but she, after tasting it, gave it to a child of theirs; and Saunders, though fond of this child, did not offer to take it from her, lest he should be suspected. The child died, and the wife recovered; and, upon an indictment, it was made a question whether he was guilty of murdering the child. The justices, after some consideration, agreed that it was murder, and the reason they gave was this: that Saunders administered the poison with an intent to kill a person, and when death followed, though to another person, they thought he should be punished, rather than the death go unrevenged; for the wife, who was ignorant of the poison, was certainly innocent of the death. And this seems consonant to the old law; for it had been long held, that if a man of malice prepense shot an arrow at a man with intent to kill, and he killed another, the crime of murder was equally imputed to him.² The same of lying in wait for one person and killing another by mistake.

But the difficult part of this case, and that which raised most doubt with the justices was, whether Archer should be adjudged accessory to the murder; for Archer's advice and aid was in order to kill the wife; and although it so happened that the daughter was murdered by the principal, yet he could not well be said to procure that conse-

¹ 5 Hume, 263.

² Plowd., 2.

quential act. This matter was therefore adjourned till the opinion of the rest of the judges could be obtained; and having depended in this manner for three years, the judges at length agreed that Archer was not accessory to the murder, for the murder of the daughter being a distinct fact from what he had contrived, they thought his assent should not be drawn further than he gave it. But rather than make a precedent of this judgment, it was never delivered, but the offender was respited from time to time till he obtained his pardon.¹

This opinion of the judges on *Archer's* case is approved by Plowden, who thinks it reasonable that he who advises or commands a thing to be done should be judged accessory to all that follows from that thing, but not from any distinct thing; as if I command a man to rob another, who resists, and, a combat ensuing, the robber kills him, I shall be accessory to the murder; because, as he was pursuing my command, I was in all reason a party to everything that happened in the execution of it. So, if I command one to beat a person, and he kills him, or to burn a man's house, and in consequence of that another takes fire, I am accessory to the fact which happened (and in the nature of things was likely to happen) in consequence of the first. But if I command him to burn the house of *A.*, and he burns the house of *B.*; or to steal a horse, and he steals an ox; or to rob such a goldsmith while at Sturbridge fair, and he robs his house in Cheapside; these are distinct facts from those I gave my assent to, and therefore I am not in law accessory thereto. Yet if I command one to kill another by poison, and he does it with a sword; or to kill him in the fields, and he does it in the city; or to kill one day, and he does it another; there I am still accessory, because the death was the principal matter, and the other but form and circumstance. However, if I command a person to do a felony, and afterwards charge him not to do it, and he does it, I am not accessory thereto, though I should be accessory if he had done the fact before, notwithstanding any secret repentance of mine.²

The distinction between murder and manslaughter still occasioned some confusion, in consequence of which there is discoverable a want of uniformity in the practice of dif-

¹ Plowd., 473.

² Ibid., 475.

ferent judges; some considering them as distinct offences, others as two names for the same offence: it is only upon this difference in the conceptions of lawyers on this subject that we can account for some singular passages in the reports. In the 9th of the queen, a man being appealed of felony and murder, was acquitted of the latter, and found guilty of the felonious killing: upon this, Dyer says it was a doubt in the queen's bench whether, upon this verdict, the defendant should be discharged of the appeal, though he could not read as a clerk, that is, whether an acquittal of the murder was not an acquittal of the whole offence charged; this was upon the idea that the murder and manslaughter was the same crime. But the court seem at last to have agreed that he should be burnt and imprisoned for the manslaughter, as they made it a question whether the queen could pardon the burning.¹ Again, in 25 Elizabeth, one Darley being appealed of murder, was found guilty of homicide, and has his clergy, as in the above case; but afterwards an indictment was preferred against him for murder, as if his former conviction for homicide did not include the offence he was now charged with. But the court there held that the former conviction was a good bar to this indictment; they emphatically declared that it was a good bar at common law, and restrained by no statute; intimating, probably, the reason upon which the contrary opinion might be founded; they said it was one fact, and no man's life should be put twice in jeopardy for one and the same offence.²

Several years after this, in the case of *Wroth v. Wiggles*, in an appeal of murder, another difficulty arose; for the evidence being, as the Court of King's Bench thought, such as to convict him of manslaughter, the jury gave a general verdict of not guilty of the murder; and being asked if he was guilty of the manslaughter, they answered, they had nothing to do to inquire of that. The court being staggered with this answer, sent Justice Fenner to consult the judges of the Common Pleas how to act, who thought the jury were not compellable to inquire of the manslaughter; upon which the verdict was taken, and the prisoner discharged.³ Much of this puzzle arose from the term manslaughter being originally a generic expression,

¹ 9 Eliz. Dyer, 261, 26.

² 4 Rep., 40 a.

³ Cro. Eliz., 276.

including murder as well as other sorts of killing, and therefore it was improperly applied to a species or sort of killing; for which reason they had lately invented the term of *chance-medley* to supply this modern application of it. A very correct writer of this reign takes notice of this confusion,¹ and says, that he shall use the word manslaughter, as Bracton and Staunforde had rightly done, as a general expression, including as well murder as other degrees of killing; and he discovers some indignation at those *unskilful* men (as he calls them) who nowadays would needs restrain it to manslaughter by chance-medley.

The new distinction between murder and manslaughter led to a singular construction being put upon stat. 3 Henry VII., c. 1. In the 20th of the queen, one Holcroft was appealed of murder, and in bar of the appeal he pleaded an indictment for manslaughter, and that he confessed the indictment. Now, notwithstanding at the time of making that statute murder and manslaughter were in law the same thing, they resolved, clearly, that a conviction of manslaughter, and clergy had, was a bar to an appeal under that act, upon the idea, probably, that clergy being taken from one attainted of murder, to give the statute some force, it should be construed to mean such attainder for killing as might have clergy, which was manslaughter. In this case they also came to some material resolutions upon the wording of the act: for it was objected that the defendant being neither *acquitted* nor *attainted*, he was not within the letter of it. But they resolved the bar to be good at the common law, and not restrained by the act; for if the defendant had had his clergy, then the appeal would not lie; and if he is *attainted*, and has his clergy, it is excepted out of the act, and left to the common law, *à fortiori*, if he is *convicted*, and prays his clergy. They said, that the words *attainted of murder* should not be intended only of a person who had judgment of life, but also one *convicted* by confession or verdict; for one attainted is a person convicted, and more; and if it did not extend to persons convicted, the whole purview of the act would be lost. Thus, stat. 25 Edward III., c. 2, says attainted by verdict, which means only convicted by verdict; and it was common in our old law-books to

¹ Lamb. Iren., 218.

confound conviction and attainder. They thought it singular that the appeal should not lie against persons *convicted*, when the statute allowed it against persons acquitted. Again, they said, that though the statute speaks of the *heir of him*, yet it had been determined in the case of one *Agnes Gainford*, that the heir of a *woman* should have an appeal under this act.¹ The same point as the above was again decided in *Wroth v. Wigges*, in the 34th of the queen.

It was laid down by the whole court in *Young's* case, that if the constable and others assisting him come to suppress an affray, and preserve the peace, and he or his assistants are killed, the law will construe it malice and murder; although the murderer did not know him, and though the affray was sudden, because they acted under authority of law: the same of a bailiff executing process, or a watchman doing his duty.²

It seems the term manslaughter had begun in this reign to receive the sense it bears at this day; but this was not established as the technical sense of it admitted by all lawyers. The writer whom we have before quoted³ says, he shall use the word manslaughter as a general expression, including as well murder as the other degrees of killing, however *unskilful* men might restrain it to manslaughter by *chance-medley*.⁴

After this observation on the change which had lately taken place in the meaning of this term, he proceeds to consider this offence in the following way: Manslaughter might happen in four ways: it might be such manslaughter as is *allowed by law* — that is, upon a certain necessity, in execution of justice, in defence of one's house, goods, or person;⁵ or it might be manslaughter upon *premeditated malice*, commonly called *murder*, and in some special instances *petit treason*. Murder was defined to be, where one man of malice prepense killed another feloniously that liveth within the realm, under the protection of the queen (as it was then), whether it be openly or privily, and whether the party slain be English or alien; which latter specification referred to the old notions comprehended in this term in the days of Glanville, Bracton, and the later times down to Edward III. The two other kinds of vol-

¹ Anderson, 68; 4 Rep., 45 b.

² 4 Rep., 40 b.

³ Lamb. Iren., 218.

⁴ Supra., 221.

⁵ Ibid., 230.

untary homicide without preceding malice are stated to be, the one, that commonly called *manslaughter*, but more properly, says this writer,¹ *homicide by chance-medley*; the other is *se defendendo*. The former was so named, because it signified a killing when people were *meddled*, or committed together by mere *chance*, upon some unlooked-for occasion,² without any former malice. The latter is a killing in *one's own defence*; however, not such a one as is justified as those mentioned above under homicide allowed by law; nor again such as is attended with circumstances of heat and sudden affray, as that before mentioned. The last of all is *manslaughter by misadventure*, which explains itself in the very terms of it.³

The crime of burglary gradually became more accurately defined, and the circumstances constituting it more nicely ascertained. In the 26th year of Burglary. the queen, it was agreed by all the judges assembled at Serjeants' Inn, that if one broke a glass in the window of a mansion-house, and drew out carpets with hooks, and took them away feloniously, this, if done in the night, was burglary, though the person doing it neither broke nor entered the house in any other way. The above case had been put to the judges for the information of the justices of assize in the county, where such a fact was to be tried. At the same time it was moved, whether, if thieves came in the night to a mansion-house, and the owner being therein opened the door, and when he appeared, one of the thieves, intending to kill him, shot at him with a gun, and the ball, missing him, broke the wall on the other side of the house; and it was agreed by them all that this was no burglary. But it was to have been held to be burglary when a person, in the night, intending to kill another in his house, broke a hole in the wall of the mansion, and perceiving where the person was, shot at him through the hole with a gun, and missed him. Again, where one had broke a hole in a wall, and perceiving one who had a purse of money hanging at his girdle coming by the hole, snatched at the purse and took it. And likewise another case was mentioned, where one came to the study-window, and seeing a casket with money, he drew it to the window, and took the money out. All these had been adjudged

¹ *Supra*, 245.² *Ibid.*, 244.³ *Ibid.*, 250.

to be burglary; which the justices approved, considering them as amounting in law to a breaking, which being at night, and for the purpose of committing a felony, was burglary. But the shooting with a gun in at the door, and the breaking the wall with a pellet, they said, neither of these was a breaking of the house with an intent to commit felony, and therefore no burglary.¹

We are told it was holden by Anthony Browne, Sir Edward Montagu, and Sir Robert Brook, if one do but make an attempt by night to enter into a house to commit a robbery, if he turn a key, being of the inner side of the door, if those within, upon a burglarious attempt being made, shall cast out their money for fear, and the assailants take it away, the offence of burglary was complete.² These opinions seem very like the notions that prevailed in the reign of Edward III.,³ when an attempt to commit an offence was considered equally criminal with the offence itself. However, they were now explained upon other grounds; and, as little as they might in fact amount to the circumstance they were construed to be, they were looked on by the eye of the law as *breakings*, and not bare attempts. There seems to have been some inclination to reject the idea of a mansion or dwelling, and to hold the breaking of any house to be a burglary. In support of this, they quoted and produced precedents of indictments in the reign of Henry VII. and VIII., and upon these indictments they said the prisoners had been hanged.⁴ Whatever might have been the opinion of judges then, and before that time,⁵ it was the more common idea now that it should be *domus mansionalis*. Upon this subject it was held by Wray, chief-justice, if a man has a mansion-house, and he and his whole family upon some accident are part of the night out of the house, and in the meantime the house is broke to commit felony, this would be burglary; and further, it was the opinion of Popham and all the judges, that where a man has two houses, and dwells sometimes in one and sometimes in another, and has a family and servants in both, and in the night when his servants are out the house is broken by thieves, this was burglary. These resolutions show it was a settled point that the house should be a dwelling-house.⁶

¹ 25 Eliz., 1 Anderson, 114.

² Lamb, Iren., 257.

³ Lib. Ass., 27 pl.

⁴ 1 Anderson, 302.

⁵ 2 Parl.

⁶ Rep., 40.

Thus far of the breaking a house and the manner of it. It was not so precisely agreed what should be called *night* so as to make the offence burglary. It was doubted by Lambard whether the twilight should be reckoned as a part of the day or the night; he observes that the law has not been uniform in its judgment upon this discrimination between day and night. We find that the time between sunset and the entire departure of light was considered as a part of the day, when an emercement was to be laid on a town for the escape of a murderer who had done the fact within that period of time.¹ On the other hand, the statute of Winchester, in speaking of the watch says, it shall continue all the night, namely, from sunsetting to sunrising; considering the twilight both at morn and evening as part of the night.² There was, therefore, no analogy in the law to ascertain what should be the time of the twenty-four hours that should be considered as *noctanter* on an indictment for burglary, nor is there any resolution in our books on this point during the time of which we are writing.

We have seen that the definition of robbery as given by Staunforde in the last reign contains no more than a felonious taking from the person of another against his will. If that author is correct in what he there states, the idea of this crime had begun to alter very soon after his time; for very early in this reign, where a person was convicted on an indictment for feloniously taking from the person *in viâ regiâ*, he was allowed his clergy; for it was held to be no robbery, if the person is not put in fear as by assault and violence.³ And this notion of robbery became now the prevailing and settled one; for in the latter end of the queen, robbery is defined to be a felonious taking of any man's goods from his person, *to his fear*, and against his will, to the end to steal them.⁴ So that fear was to be caused in the person robbed, otherwise it would be only a common larceny.

The definition of larceny which had been given by Bracton, and which, notwithstanding the law was materially altered, was retained by Staunforde in defiance of all the reports for many years, was now wholly rejected. Larceny, says Lambard, is a felonious and fraudulent tak-

¹ Fitz. Coro., 293.

² Lamb. Iren., 257.

³ 5 Eliz. Dyer, 224, 30.

⁴ Lamb. Iren., 263.

ing of another man's personal goods (removed from his body or person, for then it became, under certain circumstances, a robbery as was just mentioned) without his will, to the end to steal them;¹ a definition that approaches nearer to that of my Lord Coke, which has been followed ever since.

In this manner crimes, with regard to the legal description of them, were by degrees reducing themselves to the compass in which they appear in our days. In some we have seen the old description retained in substance, though altered in the terms; in others, the vagueness of the old description is corrected and restricted; in others, the very notion of the crime is narrowed, so that the extent of offences, and the conclusions of law upon them, became much more certain and defined.

A new and reformed commission of the peace was settled in this reign. The commission had been
New commission of the peace. successively stuffed with new statutes, the subjects of which had been occasionally submitted to the jurisdiction of the justices (a). These had now grown to a

(a) With regard to the first, the most ancient branch of the jurisdiction of justices of the peace, their jurisdiction to make preliminary inquiry into charges of felony or misdemeanor, and commit for trial, the Year-Books and other law reports, previous to this reign, contained many cases thereupon, and, probably, as it was well settled by these decisions on the common law, it was not this branch of the commission which called for settlement. And what is called the summary jurisdiction of justices of the peace in their power to convict summarily had only recently arisen; the earliest statute on the subject in the reign of Henry VIII. having been already noticed, and there being very few, if any, since then, so that this part of the jurisdiction, though it has since enormously increased, probably did not at that time call for settlement. The special jurisdiction, however, of the justices, especially in sessions, had been greatly increased by a number of statutes ever since the time of Edward III., and there was an urgent need for a consolidation of the commission. The jurisdiction had grown up by degrees since the times of Edward I., when it originally arose, and those of Edward III., when it was substantially established. Since that period it had been constantly extended by statute; as, for instance, in the reign of Edward IV., by the statute restraining the sheriff's "tourn" from finding indictments, and secreting the presentments to be sent to the sessions of the peace. There were, it is to be observed, two heads or branches of the jurisdiction of justices of the peace—the one was as conservators of the peace, in which they acted individually, in a magisterial capacity, generally by way of preliminary inquiry upon accusations of felony, or either at common law or by virtue of various statutes in the preservation of the peace, calling upon persons to find sureties, and so forth; or lastly, a summary jurisdiction, to consist of minor offences under certain statutes. The other was their collective jurisdiction, when sitting under that part of their commission which gave them

¹ Lamb. Iren., 268.

great bulk, and were still retained there, though some of them were repealed or obsolete. This added, unnecessarily, to the size of the commission. Besides this, it was otherwise full of defects, from recitals, repetitions, and the heaping together of various incongruous matters; great part of which too was rendered unintelligible by repeated errors in the penning of it.¹

This was the state of the commission when a representation was made to Sir Christopher Wray, then Chief-Justice of the King's Bench, who communicated with all the judges about reforming it. After full consideration, the commission was at length carefully revised in Michaelmas term, 1590, and a new form agreed on. This being presented to the chancellor, as a model to be uniformly issued through the whole realm, he accepted it accordingly, and sealed it, and the same has continued ever since.

The plan of this new commission was to comprehend, under words of general description, all those particulars which were before specified from a number of statutes. The first clause by which they are assigned justices of the peace includes, virtually, in it all the powers of the conservators at common law; to which is added "all the statutes and ordinances made for the conservation of the peace," which includes everything that used before to be particularly specified. The second clause gives them authority as justices to inquire, hear, and determine all the offences therein recited. So that this great charter, if it may be so called, of the authority and power of the justices of the peace, was conceived in terms of a general and intelligible import, setting forth at large the general trusts reposed in them, whether to prevent, inquire, or punish.

The executive power in the hands of Elizabeth lost none of its ancient prerogatives; but, being in general exerted for the advancement of national designs and the benefit of the people, and at the same time tempered by the prudence, if not gentleness, of her own conduct, assumed a milder appearance than it had carried in the last reign.

The queen and government.

She, as her sister had before done, continued to levy the power to hear and determine certain offences, under which they were really a court of oyer and terminer, the court called the sessions of the peace.

¹ Lamb. Iren., book i., chap. 9.

duty of tonnage and poundage before it was granted by parliament, besides an additional duty of four marks upon each ton of wine imported, which had been arbitrarily imposed by Mary. As the sovereign, during these times, pretended to the exclusive right of regulating foreign trade, a tax like this might be considered as imposed by the proper authority.¹

At a time of public danger, when the Armada was in the Channel, the people were called upon to contribute towards the general defence; the commercial towns were required to furnish ships to reinforce the navy; the queen demanded loans of money for the present exigency: all which may be excused by the necessity of the occasion, and should not be imputed to any wilful intention to violate the privileges of the people. Indeed, in this article of taxation, the queen was very moderate, and even fastidious (*a*). At the beginning of her reign she had de-

(*a*) The oppressions practised in this reign exceeded all that had been attempted under the worst of the Norman sovereigns. In purveyance, for instance, the oppressions practised were most monstrous and enormous, as we learn from Lord Bacon's speech in the next reign against release of purveyors:—"First, they take in kind what they ought not to take, next they take in quantity a far greater portion than cometh to your majesty's use, then they take in an unlawful manner, in a manner directly and expressly prohibited by several laws. For the first, instead of takers, they become taxers; instead of taking provisions for your majesty's service, they tax your people *ad redimendam vexatariam*, imposing upon them and extorting from them divers sums of money, sometimes in gross, sometimes in the nature of stipends annually paid, *ne noccant*, to be freed and eased of their oppression. Again, they take trees, which by law they cannot do—timber trees, which are the beauty, shelter, and countenance of men's houses, and that men have long spared from their own purse and profits; that men esteem for their use and delight above ten times their value; that are a loss which men cannot repair or recover. These do they take, to the defacing and spoiling of your subjects' mansions and dwellings, except they may be compounded with to their own appetites. Again, they use a strange and most unjust exaction in causing the subjects to pay poundage of their own debts, due from your majesty unto them; so as a poor man who has had his hay, or his wood, or his poultry (which, perchance, he was full loath to part with, and had for the provision of his own family, and not to put to sale) taken from him, and that not a just fine, but under the value, and cometh to receive his money, he shall have after the rate of twelve pence in the pound abated for poundage of his due payment upon so hard a condition. There is no grand profit which redoundeth to your majesty in this course, but induceth and begetteth three pounds damage upon your subjects besides the discontentment. And to the end they may make their spoil more securely, whereas certain statutes distinctly provide that whatever they take shall be registered and attested, to the end that by making a collection of that which is taken from the county, and that which is answered above their deceits, might appear thus,

¹ 5 Hume, Note A.

clined a grant, because she thought the parliament expected in return some concessions which she was not disposed to make. In the same spirit she acted through her whole reign, choosing rather to confine herself to great frugality in her expenses, than to be obliged to parliament, who had begun to be troublesome to her, or venture on unfair means of raising it. However, the parliamentary grants towards the close of her reign, while the Spaniards were hovering round the coasts, far exceeded any that had been made to her predecessors.

In other points of her prerogative she was more resolute and firm. At the opening of her reign, before any statute was made for re-establishing the Reformation, she published proclamations, prohibiting all preaching without license, and suspended the laws in being so far as to direct a great part of the Common Prayer to be used, and that all churches should conform to the practice of her own chapel.¹ At another time, when she was resolved to suppress the expensive way of dressing then in vogue, though she might have proceeded on some sumptuary law then in force, made in the late reigns, she chose, as Camden calls it, rather to deal with them by way of command; and accordingly she issued a proclamation for everybody to conform to a certain dress. But, according to that historian's account, neither this nor the laws were much regarded.²

Apprehending inconveniences from the great increase of the metropolis, she even ordered, in 1580, by proclamation, that no one should build a dwelling-house within three miles of the city gates.³

A bare relation of the queen's conduct towards the Earl of Hertford and his countess will suffice for a specimen of her power, and show how little ability there was in a subject to resist the absoluteness of it (*a*). That nobleman

to the end to obscure their deceits, utterly omit the observation of this which the law prescribes. For those fines by law they ought to take as they can agree with the subject; by abuse, they take out an imposed and enforced fine: by law they ought to take out an apprizement by neighbors in the county; by abuse, they make a second apprizement at the court gate, and judge anew at an abated price" (*Bacon's Works*, vol. x., p. 305).

(*a*) The most absolute authority of the sovereign was established in about twenty branches of prerogatives, which were, every one of them, totally incompatible with the liberty of the subject. But what ensured more effectually the slavery of the people was the established principle of the times, which attributed to the prince such an unlimited and indefeasible power as was

¹ 5 Hume, 7.

² Camb., 205.

³ *Ibid.*, 244.

had privately married Lady Catherine Grey, divorced from Lord Herbert, a younger sister of Lady Jane Grey. After

supposed to be the origin of all law, and could be circumscribed by none. The homilies published for the use of the clergy, and which they were enjoined to read every Sunday in all the churches, inculcated everywhere a blind, unlimited, and passive obedience to the prince, which on no account and under no pretension it is ever lawful for subjects, in the smallest article, to depart from or infringe (*Hume's Hist.*, vol. v., App. iii.). The historian recounts some of the prerogatives and powers exercised by Elizabeth and her immediate predecessors. "One of the most ancient and most established instruments of power was the Court of Star Chamber, which possessed an unlimited discretionary power of fining, imprisoning, and inflicting corporal punishment, and whose jurisdiction extended to all sorts of offences, contempts, and disorders that lay not within the reach of the common law. The members of this court consisted of the privy council and judges, men who, all of them, enjoyed their offices during pleasure. There needed but this one court in any government to put an end to all regular legal plans of liberty; for who durst set himself in opposition to the queen and ministry, or aspire to the character of being a patron of liberty, while exposed to so arbitrary a jurisdiction?" (*Hume's Hist. Eng.*, vol. v., App. iii.). The instances of this jurisdiction given by Lord Coke, or by other legal authorities, show how terrible it was. Lord Coke tells us that persons guilty of defamation had their ears cut off, or were branded on the forehead with the letters "F. A." — false accusers (*vide Coke*, vi., 1). Another great feature of the reign was the length to which arbitrary power was carried, and the manner in which it was exercised, especially in the Star Chamber. In Hudson's "Treatise on the Star Chamber," numerous instances are given of the exercise of the jurisdiction of that arbitrary tribunal. It was, indeed, characteristic of the dynasty, and was carried all through their reigns. Thus, he says, "in the reigns of Henry VII. and Henry VIII., Queen Mary, and at the beginning of the reign of Queen Elizabeth, there was scarce one term but some grand inquest or jury was fined for acquitting felons or murderers," i. e., persons accused of felony. He says the beginning of the reign, but it seems to have gone on all through the reign, for he gives instances in the 22d year of the queen; and, at all events, it is clear that the Star Chamber jurisdiction was exercised all through the reign. One of the worst features of this exercise of arbitrary power was indeed its tendency to interfere with jurors, or persons in judicial positions. Thus Hudson states that "Henry, Earl of Lincoln, in a private discourse, said that the Earl of Essex's insurrection in London was but a mere rout, but that he durst not but find it treason" (*Treatise on Star Chamber*). It is hardly necessary to say that it was only in the Star Chamber a peer was likely to be questioned for his verdict, and that it would be entirely illegal to do so, and an audacious exercise of arbitrary power. Yet that the earl was apprehensive of it is clear, and there is abundant reason to believe that his apprehensions were well founded. Riots were taken cognizance of in this court and severely punished. Thus Hudson states that, in the 2d year of the reign, Francis Jervis and others were fined upon the certificate of Lord Wentworth and other justices of the peace for Surrey for some riot; and in the reign of Henry VIII. one John Lowther and Gilbert Wharton were committed to the Fleet for riots certified by the justices of the peace for Westmoreland. Assaults were still more severely punished. Thus, in the 27th Elizabeth, one Greville, who lay in wait for Sir John Conway, at Temple Bar, and beat him, was punished for it. Assaults made upon privileged persons, men of the long robe, were severely punished by this court. Thus, a courtier who assaulted

the marriage he went abroad, and the lady soon appearing pregnant, the queen threw her into the Tower, and sum-

the recorder, was fined and put out of service. Mr. Serjeant Williams, being desperately assaulted by one Watkin, against whom he had been of counsel, and who attempted to stab him, the offender, in the last year of the reign, was sentenced to lose his ears and be imprisoned for life. The utter and outrageous illegality of this sentence need not be pointed out, but it is worth while to notice that it exactly resembles the cruel punishment of cutting off the hand for striking in the precincts of the court, which was first inflicted, it is believed, in the reign of Edward IV. So thoroughly was the accession of Edward IV. the era of arbitrary power, and so entirely was the character of his reign in that respect, as one both arbitrary and cruel, resembled by that of the reigns of most of his successors, the sovereigns of the Tudor dynasty. Nothing can be clearer than that this was the era of arbitrary power, and its exercise in this reign was, perhaps, more than in any other, cruel and sanguinary. The arbitrary character of the age, and the way in which it interfered with the administration of justice, may be illustrated by a single incident narrated by Hudson in his "Treatise on the Star Chamber." He says that he remembers Lord Egerton telling the court "how that he, being solicitor-general to Queen Elizabeth, and standing behind the lords, and behind Robert Earl of Leicester, when a cause was heard concerning the writing of a letter to a juror to appear, the great earl asked if that were a fault, and swore that he had done so a hundred times." The author might well remark that the great lords of the kingdom, in the country which they swayed and governed, did set an example of breach of law which the multitude followed. For in this reign juries were constantly fined, imprisoned, and put in the pillory for being influenced to give wrong verdicts; and, for instance, in such a case, in the 33d year, the jury were ordered to stand in the pillory, and also at the assizes, for this offence (*Ibid.*). And so, again, he states, that in the 31 Elizabeth, three jurors of Middlesex, who agreed to acquit one Greville, if they should be on the jury to try him, "wore papers in Westminster Hall, and were grievously fined." The tendency of this exercise of arbitrary jurisdiction, though it may have been merited in some instances, must have been to destroy the independence of justice. The publication of libels not merely reflecting upon the government, but upon peers, or persons of distinction, was always severely punished in this court, and this, perhaps, was one of the worst features of the arbitrary jurisdiction it exercised, and was the less excusable, because actions for libel afforded an ample vindication, though indictments for it do not appear to have been used, and probably the object of proceeding in the Star Chamber was to inflict punishment. Certainly the sentences inflicted for this offence were of atrocious severity. Thus a barber, for a mere lampoon, was sentenced by this court to be flogged, and Hudson mentions several similar cases in this reign, especially, he says, towards the end of it. The personation of the Earl of Lincoln in a play was, he says, severely punished, and so, in another case, a libel was severely punished. If a letter were written to one in authority charging him with any injustice, it was in like manner severely punished, as in the case where such a letter had been written to the Mayor of Wallingford. So one Booth, for writing a letter to Sir E. Coke, charging him with some improper conduct, was sentenced to stand in the pillory. So, in the course of this reign, one was sentenced to the pillory for saying the Lord Dyer was a corrupt judge. Even libels against the dead were punished, as in the instance of an alleged libel against Archbishop Whitegift. Many of the offences taken cognizance of in this court were not cognizable by ordinary law. Thus where a man of property consumed his estates in

moned the earl to appear and answer for his misdemeanor. This was in 1561. He returned, acknowledged the mar-

lewdness, and his wife and children had not wherewithal to maintain them, the court directed the Master of the Rolls to settle him in a certain course, and ordered him to obey it. So persons who kept unlawful gaming-houses were severely punished (*Hudson's Treatise on the Star Chamber*). "Infinite more," says the author, "are the causes usually punishable in this court, for which the law provideth no remedy in any ordinary course, whereby the necessary use of this court to the state appeareth, and subjects may as safely repose themselves in the bosoms of these honorable lords, reverend prelates, grave judges, and worthy chancellors, as in the heady current of burgesses and meaner men, who run too often in a stream of passion after their own or some man's private affection." But for the punishing of offences which other courts might punish, the precedents, says Hudson, were infinite. "For misdemeanors committed in any court, the judges of that court may punish; so may the court of Star Chamber." All extortions in all courts, bribery, corruption of officers—in a word, there was no offence punishable by law, but if the court found it grew in the commonwealth, this court might punish it, except only where life was questioned. Thus he mentions instances in which the parties had been fined and imprisoned in the King's Bench, and yet prosecuted in this court. And in the case before mentioned, of Sir John Conway against Greville, the defendant was first fined before the justices of the peace in Middlesex, and yet afterwards sentenced in this court, it being a mere assault. And so, also, fines set by any justice of the peace for any riot or force, were no bar to the high power of this court, but, in their discretion, they might either fine it, or add some exemplary punishment to it (*Ibid.*). All contempts were severely punished in this court, as where Lord Bendon called a witness knave, and was fined £100, equal to £1000 now. And when Sir Rowland Stavley, a knight of Cheshire, having been severely handled in this court, said he had been sentenced and imprisoned by those who had no authority, he was again prosecuted in this court, and punished. Even offences against ecclesiastical law were punishable in this court, as in the instance mentioned by Hudson. By the statute 5 Elizabeth all men were forbidden to use any other divine service than that which was thereby appointed, and the Lord Hastings and Sir P. Wharton were here brought to the bar for hearing mass, and punishment inflicted. In some cases, certainly, it should seem that there would be no other effective remedy, as in the instance Hudson mentions of one Ligate, who in the 5th year of the reign was questioned on account of having executed one man for another in Wyatt's rebellion, and was punished. He could not have been indicted for murder if it was a mere mistake, as there would be no felonious malice, and it is difficult to see what other course could have been taken. So as to cases of negligence or abuse by justices of the peace of the duties of their offices. Thus Hudson says that it was usual in all great riots which were sentenced in Philip and Mary's time and Queen Elizabeth's time, that the court recommended the queen's counsel to put in an information against the justices of the peace next adjoining. The tendency of this to impel the justices to severity in the repression of riots must be obvious. There is no trace of any complaint on the score of excessive severity. Sir James Mackintosh very truly says: "The conviction of Throgmorton upon confessions obtained from him by deceitful promises, and the fear of torture, shows that in England, at this period, life was as insecure as under the most implicit and barbarous despotism of the East or West. The process, indeed, of applying, conjointly, bodily torture and perfidious hope, was exactly similar to that of the tribunal which, in England, is a byword for judicial iniquity" (*Hist.*

riage, and was also committed to the Tower. A commission was issued to inquire into the validity of the marriage, which the earl, not being able to prove within the time prescribed to him, was declared void. But the countess proving pregnant again, the queen procured a fine of £15,000 to be put on Hertford by the Star Chamber, with directions for stricter confinement. This continued for nine years, till his wife died, when, the cause of the queen's jealousy now being removed, the earl was released.¹

If a nobleman of high rank and fortune was liable to such tyrannical oppression, the condition of persons in inferior stations must have been truly deplorable. Before the times of Henry VII. the nobility, supported by their wealth and power, were enabled to afford protection to persons who depended on them, even against the crown, and a precarious kind of liberty was diffused through the nation. But things had from that time taken such a turn, that the present nobility had become themselves the retainers of the court, where they contributed to increase the power of the crown at the expense of everything. While they sat as judges in the Star Chamber, they would very readily gratify

Eng., vol. iv.). The high commission court was also arbitrary. But martial law went beyond even these two courts in a prompt, and arbitrary, and violent method of decision. One great characteristic of the reign, indeed of the dynasty, was the arbitrary use of martial law as a means of civil government. The streets of London were much infested with idle vagabonds and riotous persons. The Star Chamber had exhausted its authority, and inflicted punishments on some of the rioters. But the queen, finding these remedies inefficient, revived martial law, and gave a commission of provost-martial, granting him authority, upon notice given by justices of the peace in London or the neighboring counties, if such offenders worthy to be speedily executed by martial law, to attack and take them, and according to the justice of martial law to execute them upon the gallows or gibbet (*Rymer*, vol. xvi., 792). It would be difficult to find, says Hume, an instance of such an act of authority in any place other than Muscovy (*Hist. Eng.*, vol. v., App. iii.). Whenever there was any insurrection or public disorder, the crown employed martial law; and it was during that time exercised not only over the soldiers but over the whole people. Any one might be punished as a rebel, or an aider and abettor of rebellion, whom the provost-martial, or lieutenant of a county, or their deputies, pleased to suspect. Lord Bacon says, that the trial at common law granted to the Earl of Essex and his fellow-conspirators was a favor, for that the case would have borne and required the severity of martial law (vol. iv., p. 510). There remains a proclamation of hers in which she orders martial law to be used against all such as import bulls or even forbidden books from abroad (*Strype*, vol. iii., p. 570); and prohibits the questioning of the lieutenants or their deputies for their arbitrary punishment of such offences, any law or statute to the contrary notwithstanding.

¹ 5 Hume, 62.

the inclinations of the prince, by sentencing any obnoxious individual, and even one another, to the severest and most ruinous penalties. The courts of justice were also kept in awe by this supreme judicature; and no redress or relief could be expected from ordinary judges against the decrees of this tribunal, which would not scruple to punish such judicial interference as the highest contempt. No remedy could be expected but from the parliament; and the queen took care to keep that assembly as much under the dread of this court and her prerogative as the meanest individual.

The first disposition the queen showed of her resolution to keep the House of Commons under control, was on occasion of the debate about the settlement of the crown and the queen's marriage; when, hearing that the Commons had appointed a committee to confer with the Lords, she sent express *orders* not to proceed in that matter. The House were dissatisfied with this prohibition on their debates, and questioned the queen's right to interfere in this manner, till, after making one more attempt to silence them, she at length thought it prudent to allow them free liberty to debate the point. The House were softened with this condescension; but the queen soon dissolved them, with a speech which had the appearance of a severe animadversion on their conduct.¹ This was in the parliament of 1566. In that of 1571, one Stricland having moved a bill for reformation of the liturgy, a subject on which the queen was always particularly jealous, as belonging only to her prerogative, he was summoned before the council, and prohibited from attending the House; but this creating some sharp debates, *permission* was sent him to appear in parliament.² Robert Bell, having made a motion against an exclusive patent granted to some merchants, was sent for by the council, and severely reprimanded. This had the effect, at the time, of making the members speak with more caution.³ She went further than censuring individuals. The Commons, in 1572, had passed two bills to regulate ecclesiastical matters; but she sent them a menacing message, and put a stop to their proceeding.⁴

All this was submitted to with great impatience by persons who had imbibed notions of liberty not very common

¹ Camd., 84, 85.² 5 Hume, 177.³ Ibid., 180.⁴ Ibid., 201.

in those days. In the parliament of 1576, Peter Wentworth, who had often before, as well as his brother Paul, distinguished himself by his resistance to such interference of the queen, animadverted in very plain terms on the imperious conduct of Elizabeth, and the shameful fear the House discovered of the privy councillors. But the Commons had been so disciplined by the queen's former injunctions, and the treatment some of its members had felt, that they took the tone of the court, sequestered Wentworth from the House, committed him to the serjeant-at-arms; and, to show the spirit of their proceedings as clearly as possible, they ordered him to be examined by a committee, consisting of such members as were privy councillors. The committee met *in the Star Chamber*. Wentworth refused to answer till they acknowledged they sat not as members of the Star Chamber, but as a committee of the House. After he had suffered a month's imprisonment, the queen, with her usual discretion, sent to the Commons, acquainting them that, from her special favor and grace, *she* had restored him to his place in the House. Nor was the absurdity of her restoring to the House a member committed by themselves at all observed.¹

The House of Commons, in 1580, voted a fast, for which they were reprimanded by the queen, this being an encroachment on her prerogative and supremacy over all spiritual things. They submitted, and asked forgiveness.² She never would suffer the House to touch on ecclesiastical matters; nor did any one escape with impunity who attempted to move anything on that subject. In 1589, some members were committed to custody for speaking against the high commission, as were several in 1593, among whom was Peter Wentworth. The offence of this famous man was, that he presented a petition in parliament to the Lord Keeper, in which he desired the Upper House to join with the Lower in supplicating her majesty to entail the succession of the crown; another was also committed for seconding it; and two others, because he had communicated it to them. Morrice also, who presented a bill against abuses in the bishop's courts, was seized in the House by a serjeant-at-arms, and kept some years a prisoner in Tilbury Castle.³

¹ 5 Hume, 227.² *Ibid.*, 236.³ *Ibid.*, 365.

When any debates arose in the House upon matters of prerogative, it was usual with the queen to stop them by a message which promised an alteration. This always prevented any proceeding in a parliamentary way; as it did in the question of purveyance in 1589, and of monopolies in 1601.¹

It is related by Camden, that Peter Burchet, a fanatic, having stabbed in the streets Hawkins, the famous navigator, under a notion that it was lawful to kill such as opposed the truth of the gospel, the queen ordered him to be presently executed by martial law. But she, being informed that martial law was not to be used but in camps, and in turbulent times, he was proceeded against in the ordinary way.²

A short review of the state trials in this reign will show whether those who were dealt with according to all the forms of law were protected entirely from oppression.

The trial of the Duke of Norfolk was before the high Trial of the Duke of Norfolk, steward for treason. Upon request to have counsel, it was refused, because the court said it was never allowed in treason as to the fact. And when Humphry Stafford's case, in 1 Henry VII. was urged, they answered, that was to the point of law; namely, whether sanctuary should be allowed.³ However, the chief-justice engaged for the sufficiency of the indictment, for *it had been well debated*, he said, *and considered by us all*; that is, by the judges before the trial.

The conduct of this trial was as singular as any that preceded it. One of the treasons was compassing to deprive the queen of her throne and dignity, under stat. 13 Elizabeth. The duke's design to marry the Queen of Scots was considered as making him a party to such a compassing; but this was to be proved. The serjeant who opened for the crown, instead of producing evidence for that purpose, urged the duke to confess⁴ his knowledge of the Scottish queen's pretended title to the English crown; offering, if he denied it, to make proof of it. This led to some close interrogatories put by the serjeant, and explanations on the side of the duke, in which he disclosed what he knew of her quartering the arms of England. When the duke found himself pressed by these

¹ Hume, 347, 441.² Camd., 199.³ State Trials, 86.⁴ Ibid., 89.

interrogations, he called upon the counsel to prove his knowledge of Queen Mary's intentions; to which he received for answer, *that he had confessed, and there was no need.*¹ The evidence against him consisted of examinations in writing, confessions of himself, and others, with a *copy* of a letter of his own, and the letters of others. This was helped on by the asseverations of counsel, and declarations which were said to have fallen from the queen's own mouth.²

This was the evidence produced; and upon this the counsel, who were four in number, made their observations, addressed sometimes to the duke, sometimes to the court; propounded questions to the prisoner, and entered into altercation with him.

Thus was this noble personage harassed with every mode of attack, being constrained singly to stand the ingenuity and zeal of eminent advocates enforcing a charge with a species of evidence out of the power of the accused to controvert.

The plain dictates of common sense enabled him, unlearned as he was in the law, to except to the sort of persons whose depositions were produced, that they were not credible, and confessed themselves guilty of treason. He prayed that they might be brought face to face with him, as the law of the land he trusted required; alluding, probably, to the two statutes of Edward VI., of which so much has already been said. But the counsel for the crown answered that it was true the law had been so for a time, in some cases of treason; but since the law had been found *too hard and dangerous for the prince*, and it had been repealed,³ meaning by the statute of Philip and Mary.

Upon such kind of trial the duke was pronounced guilty of the indictment, and was executed. Such proceedings as this, however usual they might be, were certainly not unnoticed by the world. Something like this, probably, drew from Sir Christopher Hatton, on another occasion,⁴ an observation, that the justice of the realm had of late been very impudently slandered. To prevent which, for the future, he seemed then to think it advisable to be very certain that the matter of the indictment,

¹ State Trials, 90.

² Ibid., 110.

³ Ibid., 98.

⁴ Parry's Trial, 1 State Trials, 122.

then depending before him (though confessed), really amounted to treason.

The trials of Babington, and the others concerned in Mary's conspiracy, were conducted in the same manner; and the convictions of such as did not plead guilty were had upon the depositions of absent persons.

The indictments against these conspirators were all laid upon stat. 25 Edward III. When one of the prisoners objected that by stat. 1 and 13 Elizabeth there must be two witnesses, and those brought face to face, imagining that the indictment was upon those statutes, the Chief-Justice Anderson said, that true, the overt act upon stat. 1 and 13 Elizabeth must be proved by two witnesses; but this is upon stat. 25 Edward III., which speaks of those who *imagine*; and *how*, says he, *can that be proved by honest men, being a secret cogitation which lieth in the minds of traitors?*¹ So that treason would, by these means, never be revealed! Thus was the law laid down by a sage, who was at the head of it; which *dictum* passed uncontradicted. It may be observed that these severe laws which enacted treason,² had defeated their own object, by containing the clause which required two witnesses. For the crown lawyers always thought it most convenient and sure to proceed on the stat. 25 Edward III.; and when the above-mentioned exposition could be put upon it, surely no other help towards the conviction of every one who was tried could possibly be wished for.

The proceeding against Mary Queen of Scots, as it was on a particular statute,³ is hardly to be judged of upon the same rule as the others. The prosecution was, however, supported in the same way as the former, upon written evidence. Two witnesses were indeed heard *vivâ voce*, but this was rather to patch up the prosecution, which seemed to need support; for they were not heard in the presence of the queen, nor at the trial, but at another time, when the commissioners met to give judgment.⁴

Whether this mode of proceeding had raised some clamor, and a consideration that the stat. 1 and 13 Elizabeth, because they required two witnesses in treason, were declined by the government, and the statute of Ed-

¹ Parry's Trial, 1 State Trials, 137.

² Namely, 1 and 13 Eliz.

³ 27 Eliz., c. 1.

⁴ 1 State Trials, 155.

ward III. preferred, because it did not give that benefit to a prisoner, might have been the cause that no small degree of malevolence was imputed to the governing powers; or whether some doubt might begin now to be entertained that the statutes of Edward VI. were still in force; whatever might have been the reasons which weighed with the courts, they began to alter their conduct in this particular; for we find in 31 Elizabeth, in the trial of Lord Arundel, that the queen's counsel called two witnesses to give a kind of hearsay evidence as to their knowledge of the matters opened; and then some others were called, whose testimony did not go further.¹ This indictment was upon 25 Edward III.

This seemed now to be a method which they had hit upon to support and give color to the rest of the proofs which were still of the old kind. In 34 Elizabeth, on the trial of Sir John Perrott, besides the reading of depositions, some witnesses were called.²

The trials of Lord Essex and Lord Southampton exhibit a mixture of both; there are examinations of persons absent, and the depositions of persons present in court read and attested by the deponents *vivâ voce*.³ The only witness not of that kind was Sir Walter Raleigh, who related upon oath what was *told* him, and spoke nothing from his own knowledge. Sir Ferdinando Gorges being pressed by the Lord Essex to speak to some facts, at first declined it, and referred to his deposition. The famous testimony of Mr. Francis Bacon in this trial did not go to the fact of criminality. Sir Christopher Blount and his associates were likewise convicted of treason upon depositions only.⁴

All these prosecutions, as we have before observed, were upon the statute of Edward III., which was quite contrary to the expectations of the parties, who generally supposed they were indicted on the two statutes of the queen before alluded to, and were much disappointed when they were told they were not entitled to have their guilt proved by two witnesses as prescribed by those acts. It is true that these statutes require indictments upon them to be brought within a certain limited time, and therefore, in some cases, would not have answered the ends of justice; yet, where they might, as in Lord

Of trials for
treason,

¹ State Trials, 168. ² Ibid., 192, 193. ³ Ibid., 200, 201. ⁴ Ibid., 209.

Essex's case, they were not put in use. The old statute of Edward III. was preferred, for the reasons we before gave; upon this act they put what interpretation they pleased, so much so, that they ventured to pronounce that no overt act need be proved on an indictment upon that act.

It was always the principal charge in these indictments that the party compassed the death of the queen, a charge of which all expressed the extremest detestation; and as the facts, even such as were proved, were quite of another kind than such as indicated an attempt against her person, when they found themselves convicted of the whole indictment, there followed a dissatisfaction and murmur as against the justice of the verdict. This was not explained till the trial of Lord Essex, in 43 Elizabeth, when the two chief-justices and the chief-baron agreed in the following opinion: That "where a subject attempts to put himself in such force as the king shall not be able to resist, and to force and compel the king to govern otherwise than according to his own royal authority and direction, it is manifest rebellion." And, "that in every rebellion, the law intends, as a consequence, the compassing the death and deprivation of the king, as foreseeing that the rebel will never suffer that king to live or reign, who might punish or take revenge of his treason or rebellion."¹ And, afterwards, in the case of Sir Christopher Blount and his associates when they disavowed any design to kill the queen, the chief-justice condescended to explain this to them in a like way, and it was declared to be no mystery of law.²

However this might be law and sense, where resistance and force were used, as in the case of Lord Essex and Sir Christopher Blount, it is difficult to reconcile it with either when applied to Sir John Perrott, whose offence seems to have been only some peevish and angry speeches made in conversation respecting the queen, and, at worst, nothing more than some omissions of duty, or want of activity in his place of Lord-Deputy of Ireland. How this could be compassing to kill the queen or raising rebellion is very mysterious, notwithstanding all the intentions and suppositions of law.

A prosecution never missed of its aim from any defect

¹ State Trials, 207.

² Ibid., 209.

of evidence, or of anything else. Against the weight and ability of the crown-lawyers a prisoner had nothing to oppose. He was allowed no counsel; and if he prayed the court in their humanity to see that the indictment was sufficient, they answered him that they sat there not to give counsel, but to judge. Even the innocence of a prisoner could not be made out; for witnesses were not to be heard against the crown, as the judge told Udal, who was tried for felony only.¹ Juries were no protection to the subject. They were generally, it may be supposed, packed; for though the court might perhaps allow challenges for cause, they would not allow a prisoner to take one peremptory challenge.² Nobody was, nor does it appear how any one possibly could be, acquitted. A trial for high treason seems in this reign to have been a formal, but a certain method of destroying an obnoxious man.

This partial mode of proceeding was not confined to treasons, where an anxiety to preserve the sovereign and the state might be thought a sufficient cause in those days to take away the lives of such as were only suspected by any sharp or hasty way of inquiry whatever. But in prosecutions for felony, where the government had taken a part in the object of it, trials were conducted in a similar manner. Udal was tried for felony on stat. 23 Elizabeth, c. 2, which had made it felony to make any book containing false, seditious, or slanderous matter, to the defamation of the queen, or to the moving of rebellion. This man was indicted for having written a book called the "Demonstration of Discipline," in which he attacked the bishops, which was considered as within the act. The proceeding was entirely consistent with such a setting out. There were only the depositions of two persons read. One of these, says Udal, told him he was the author. The other says a friend of Udal's told him so.³ The court offered to swear Udal whether he was the author or not, and refused to hear the witnesses which he offered to produce. So that, with all this prejudice against him, there could be little doubt of the conviction which followed.

Though it is probable that this extreme eagerness and pains to convict were confined only to such prosecutions

¹ State Trials, 173.

² Captain Lee's Trial, 7 State Trials, 43.

³ State Trials, 173.

as were carried on by government, yet all the criminal proceedings of this time most likely partook of the irregularity we see in these. It would not have been safe or wise to have pursued a plan entirely different from the prevailing one in ordinary trials.

The use of depositions had probably become more frequent of late, as they seemed now to be a sort of evidence which had received the sanction of law, by stat. 1 and 2 Philip and Mary, c. 13. That statute had directed justices of the peace to take the examination of all persons accused, and the information of accusers, and transmit them to the gaol-delivery. Thus, in all cases of felony at least there was in court a body of evidence taken as the law directed, and any further hearing of the parties might be thought superfluous. However, it is not to be supposed that there was no evidence given for a prosecution but such depositions and examinations; witnesses were sworn, and delivered their testimony *ore tenus* in court; and it is most likely *in common cases* the prisoner was allowed to produce witnesses in his defence, according to the direction formerly given by Queen Mary to her judges. Yet, probably, the rules of evidence were the same as prevailed in these greater causes: they allowed of hearsay informations, and gave way too much to strong presumptions of guilt.

It appears that torture was sometimes used. Campian, the Jesuit, is said by Camden to have been put to the rack.¹ This could not have been by the ecclesiastical law, as there was no high commission in being in 1580. It is not probable it could have been directed by the ordinary courts. It must have been under the immediate order of the sovereign or the Star Chamber.

Adjudged cases in this reign are reported all through it by Anderson, Moore, Leonard, Owen, and Noy. Reporters. Some principal cases in the first part of it are in Plowden, and in the latter part they are in greater number in Coke. The former part of this reign is also reported in Dyer, Dalison, Benloe, and the book called "New Benloe." And the latter part in Godbolt, Brownlow, and Goldesborough; but more particularly and regularly, from the twenty-fourth year to the end, by that concise and judicious reporter, Sir George Croke. All

¹ Camd., 247.

through this reign there are scattered cases in Jenkins, and here and there in Cary, Saville, Hutton, and Popham, and some in Keilway.

The books published in this reign increased the law library to some size and value. Some persons, who had been in the habit of taking notes of what passed in court, had come to a resolution of publishing them for the use of the profession. The first who did this was Mr. Edmund Plowden, who printed the first part of his adjudged cases, under the title of "Commentaries," in 1571; and the second part, about seven years after. The success and applause with which this first attempt was received encouraged the executors of Sir James Dyer, who had been chief-justice of the Common Pleas, to print some of the notes which he had left behind him. This was done in 1585, under the title of "Reports," so that this was the first book which bore that name. These were followed by Sir Edward Coke's "Reports" (for so he called them), which were printed in 1601 and 1602; then Keilway's "Reports" in 1602. Bellewe's "Reports," and the "New Cases" were also printed some time in this reign; which make up all the books of this kind in print at the death of Queen Elizabeth.

The manner in which Plowden has reported the decisions of courts, is peculiarly his own; none having set him a model, nor any having attempted to rival him. After having stated, in a clear manner, the case and matters of doubt to be resolved, he gives the arguments of the counsel on both sides at length; always following the course of reasoning precisely, with the topics and precedents quoted by each, in the exact style of a formal debate. In reporting the judgment of the court, he gives severally the opinions of the judges at length. A case discussed in this ample way, with all the argument of each side, considered, distinguished, and commented on by the experience and learning of the bench, must be so thoroughly sifted, as for it to be impossible not to discern the true points of a cause, and the ground upon which it was determined. Most of the cases in this book are upon demurrers, or special verdicts; and there are generally the pleadings annexed. Whether all arguments and opinions were delivered in court precisely in the detail in which we have them in Plowden; or whether the reporter,

who says that his practice was to make himself master of the case in all its points, before he heard it argued, might not retouch them according to his own fancy afterwards; whatever was the fact, it is certain that the principles and great leading rules of law are opened and explained with an acuteness rarely discovered in other books; and points are maintained and canvassed with a certain wary closeness of reasoning peculiar to this writer: so that altogether it is one of the most instructive and most entertaining books in the law.

Sir Edward Coke is an author of very different character from the foregoing. The manner in which he
Coke.
reports is *jejune* and summary, without tracing out any form of argument. His general way is to give a state of the case, then to relate the effect of all that is said on one side, and likewise on the other; beginning always with the objections, and concluding with the resolution and judgment of the court.¹ Sometimes he only gives the state of the case, and the resolutions of the court; and sometimes without any case stated at all, he mentions only the name of it, and then sets forth the points of law resolved by the court. This is always done with great weight of reason and clearness of expression. He abounds, beyond any writer, in old law; and excels in adducing proofs from adjudged cases, comparing them, and reconciling apparent repugnancies upon solid and true distinctions. At present, Lord Coke can only be mentioned as the author of the three first parts of his Reports, which is confining him in a very narrow compass. It was not till the next reigns that he published the other parts of his Reports and his Institutes, which make him a very voluminous, as well as a very eminent, writer upon the English law.

From the writings of Plowden and Coke the law derived new strength and lustre, and the study of it was considerably advanced. Their merits, however, are very different, though both writers are excellent in their way: the one, argumentative and diffuse, calls for a patient and steady perusal through the windings of many intricate deductions; the other, concise and learned, demands a fixed attention to peremptory propositions and authentic con-

¹ Pref. 10 Rep., 12.

clusions of law. The latter, from the shortness of his manner and of his matter, may be taken up at any time with profit; the former, being prolix in both, must be read through and studied with care and reflection. From the former may be attained a habit of legal reasoning, and the student may always exercise himself there with new pleasure and improvement; in the latter, he will possess an inexhaustible treasure of sound and incontrovertible law.

Plowden's Commentaries contain reports of cases from 4 Edward VI. to 20 Elizabeth. Lord Coke reports from that period to the end of the reign.

The reports of Sir James Dyer contain the period from 4 Henry VIII. to 23 Elizabeth. This "Report of Adjudications" is not to be compared with the two former works, being many of them short notes of cases, and none of them intended to be published, but were such as were collected out of that judge's papers by his nephew and executor. None of the cases are here so fully argued, nor the points so much treated at length, as in the two former reporters. They seem to be the concise notes of a man of business, containing an accurate state of the case, with the objections and answers as shortly as conveniently could be.

Besides the reporters, several treatises and collections were printed. In 1596 was published Rastall's "Entries;" in 1568, Brooke's "Abridgment of the Law;" in 1572, the "Terms of the Law," by Rastall; in 1577, Pulton's "Abstract of the Penal Statutes;" in 1579, Theloeal furnished the profession with his "Digest of Original Writs;" in 1580 was printed "Kitchen on Courts;" and, in 1598, a book upon "Forest Law" was published by Manwood.

Rastall's Entries is a collection made by that learned judge; none of the precedents were his own, but were taken out of four different books: from the old printed book of Entries; from two manuscript collections made by a prothonotary of the Common Pleas, and a secondary of the King's Bench; and from a manuscript of Sir John More, a judge of the King's Bench, in the time of Henry VIII.,¹ and grandfather of the author.

Law treatises.

Rastall.

¹ 9 Hen. VIII., Dugd. Chro. Sess.

They are digested in perspicuous order; and, by means of divisions, subdivisions, and the variety of references, the contents of the book are extremely accessible. We may judge by the sources from which this collection was made, that these precedents were those in use in the time of Henry VI., and down through the reign of Henry VIII., and by the publication of them there can be no doubt but they were now in use. This book contains not only declarations and pleas, but many records at length.

The Abridgment of Sir Robert Brooke is an improvement on the plan of Statham and Fitzherbert.

Brooke.

The cases are here arranged with more strict regard to the title; but the order in which they are strung together is very little better, being generally guided only by the chronology. He observes one method, which contributes in some degree to draw the cases to a point; he generally begins a title with some modern determination, in the reign of Henry VIII., as a kind of rule to guide the reader in his progress through the heap of ancient cases which follow. He abridges, with great care, in the language of his own time, sometimes adding a short observation, or *quære*, furnished by the experience of later times. So that, upon the whole, the substance of the Year-Books, to which it is an excellent repertory, is conveyed in this one volume, in a style and manner more generally acceptable than the original. This has the praise of being the most correct of these works.¹ However, such works, with all their use, can rarely be ultimately relied on: the opinion of a court can hardly be so abridged as to convey all the circumstances which had their weight in a determination; something will escape in the transfusion. As far as the nature of their design can go, they are of excellent use; and the full extent of their design was not tried till the very methodical work of Mr. Justice Rolle appeared, and the modern ones of Bacon and Comyns. An application to such a work as this to comprehend the great outline and extent of any branch, and a patient reading of the particular cases reported at length, more minutely to discern the grounds and principles upon which they were adjudged, is a union of laborers which is necessary to form clear conceptions of the law.

¹ Foster.

Other treatises were published in the latter part of this reign. In 1583, Crompton printed in French "the Office and Authority of a Justice of Peace," principally taken from Fitzherbert's works, enlarged by the same author. After this Mr. Lambard revised his "Eirenarcha," which had gone through two editions, Lambard. one in 1579, the other in 1581; and making great use of Mr. Crompton's book, which had been published in the meantime, reprinted in English, in 1599, his "Eirenarcha, or the Office of a Justice of Peace," a work much more full, complete, and satisfactory than any of the former. The office of these magistrates had become burdensome, owing to the increase of laws, and the multitude of concerns they were to determine on. It was very necessary that some pains should be taken to smooth the way towards the attainment of the requisite knowledge by some well-digested treatise. The criminal law is treated by this author in a very different way from any who went before him. It has none of the concise starchness discovered in the compilations of Staunforde and Fitzherbert, but discourses more at large in the liberal style which few writers upon the law had condescended to imitate since the time of Bracton, Fleta, and Britton. Fortescue's book, "De Laudibus," and the "Doctor and Student," were the only pieces (unless Littleton may be thought worthy to be excepted) of authority upon legal subjects which were not put together with all the closeness and dryness of mere compilations.

Mr. Crompton printed also, in 1594, a French treatise on the "Authority and Jurisdiction of Courts," a book which left sufficient room for the additions and improvements made by writers who soon followed him on the same subject.

A spirit of inquiry had spread itself, which would not be satisfied with the materials of modern knowledge; they began to look higher, and to investigate the antiquity and history of our jurisprudence. To forward this, was printed in 1569 the valuable code of our ancient law written by Bracton; and to carry this pursuit still further, Mr. Lambard printed, in 1568, his "Archaionomia," containing the Anglo-Saxon laws, those of William the Conqueror, and of Henry I. Thus were the old volumes of the law once more brought into observation.

However, at this distance of time, they fell rather into the hands of the inquisitive and learned, than afforded much assistance to the practiser.

It does not appear what time of probation was fixed before *apprentices* were permitted to practise in the courts at Westminster, nor whether it was an act of the society of which he was a member, or of the judges, that he was allowed to practise at all. Every society had its particular orders, all differing a little; and according to them they respectively appointed their readers, teachers, and others, and regulated all exercises required of the students.

Miscellaneous
facts.

In the 3 and 4 Philip and Mary there had been some orders agreed on by the inns of court for a general regulation to be observed in each. They mostly concerned dress and attendance at meals; among the rest, there is one that forbids the admission of attorneys. If any one *practise attorneyship*, he was to be dismissed, but to be permitted to repair to an inn of chancery.¹

At the beginning of this reign, the judges had taken into consideration the government of these societies; and upon All-Soul's day, in the 1st Elizabeth, they came to some resolutions, which they promulgated for the observance of all the inns of court. The like was done in 16th Elizabeth, by commandment of the queen and advice of the privy council. Again in the 33d, 36th, and 38th years of the queen.²

The course of study seemed at this time to require every one should commence by residing at an inn of chancery, and then proceed to some inn of court. As all the inns of chancery belonged to some one of the inns of court, they were under their government in all matters, and particularly in what concerned the education of students. The study of the place was, in a degree, ordered and promoted by *readers*, who were appointed to *read lectures* upon certain points, both in the inns of chancery and of court. These readings were very frequent, both in term and vacation. Besides these, there were exercises which the students engaged in under the direction of the readers. These were called *moots*, and had various names in the different societies, according to the seasons and occasions when they were held.³

¹ Dugd. Orig., 319.

² Ibid.

³ Ibid.

We have seen that heretofore there were only two description of advocates; these were *serjeants* and *apprentices*. But we find in this reign (and no doubt it had been so some time), that the orders of the profession were these:—The lowest was a *student*, called also an *inner barrister*, and so distinguished from the next rank, which was that of an *outer*, or *utter barrister*; then came an *apprentice*, and next a *serjeant*.

We shall now consider the regulations which we just said were made by the judges concerning the professors of the law.

It should seem that the *students* commenced *inner barristers* when they entered upon their exercises for the bar, which is much like the condition of a *soph* at the universities, who is performing his exercises for the bachelor's degree. None were to be admitted to the bar but such as had been at least of seven years' continuance, and had kept all their exercises at least three years within the house, and in the inn of chancery, according to the orders of the house. Only *four* were to be called every year. In some houses the benchers called, in others it was the business of the reader to call inner barristers to the bar, and in all the reader's report of their merit and qualifications was the supposed ground for calling.

When persons were called to the bar, they were still expected to preserve a silence; for no utter barrister was admitted to plead in any court at Westminster, nor to subscribe any bill or plea, unless he was a *reader* or *bencher*, or had been *five years* an utter barrister, and had continued all that time in exercise, or a reader in chancery, two years at least. An utter barrister was to keep his exercises, both in his house and in the inn of chancery, for three years after he was at the bar, otherwise he was not to continue an utter barrister.

It was probably at the end of these five years, or when utter barristers were by any of the above-mentioned qualifications admitted to plead, that they arrived at the distinguished rank of *apprentices of the law*. It does not appear that they were yet called *counsellors*. A reader was not to practise but in his reader's gown, having a velvet welt on the back. Readers ranked before utter barristers, and next after apprentices. This is all that can be collected of the professors of law at this time, from

the rules and orders settled for their government and regulation.¹

There was a character and description in the law, which had subsisted from a very early period, but which had now grown to a high consideration; this was that of a *clerk*. It was the business of the three prothonotaries of the Common Pleas to *draw* and *enter* all declarations and pleas in causes depending there. To assist them in this business, they kept clerks, who had been brought up in the office, and were as well acquainted with the duties of it as the prothonotaries themselves, to which they in course of time succeeded. All attorneys who had causes here were to employ some one of these clerks, to conduct that part of his cause which consisted in declarations, pleas, and entries. And it had lately become not uncommon for some of these clerks to act also as attorneys, and so sue out writs and manage an action from beginning to end.

The continual habit of business gave the persons conversant in this office a great dexterity in pleading and practice; and the appellation of *clerk* coming at length to signify the possession of these attainments, was assumed by the pleaders of these times with no small degree of complacency. The character of a *good prothonotary*, or a *good clerk*, was not a little addition to the praise of a lawyer.

Thus the prothonotary's office became the school for pleading; and young men used to be placed there at their entrance upon their studies, to learn this most essential part of legal knowledge. We find Sir James Dyer, when he was chief-justice of the Common Pleas, in his address to the attorneys and officers of that court, telling them that he had been himself some time a *clerk in that office*.²

Many regulations were made by order of the Court of Common Pleas for securing to the clerks in court their proper business, to prevent attorneys from encroaching on them; to oblige attorneys to make due payment of the fees to their clerks; and the clerks to account with prothonotaries. Many orders were also made to compel attorneys to a regular attendance on the court, and to confine the officers to a proper discharge of their duty.³

The privilege of entering was secured to the prothono-

¹ Dugd. Orig., 310-316.

² Praxis. Ut. Banc., 46.

³ Ibid., 35, 36.

tary by several orders. No continuance, says one order, nor discontinuance, no alteration or amendment, shall be made in any roll of the court, nor in any writing going out of the office of this court, by any attorney, upon pain of imprisonment.¹

Attorneys were now grown to a considerable body of men; and, therefore, to prevent persons acting in that capacity who were not known to the court, and so not easily amenable to censure, it was ordered by the Court of Common Pleas, in 15 Elizabeth, that no attorney of the court shall give, let to rent, or lend his name to any person, nor suffer any person to use his name, under the penalty of forfeiting, for the first offence, twenty shillings, and for the second offence, of being expelled from the court.² For reformation of the excessive and unnecessary number of attorneys, it was ordered, that an attorney absenting himself two terms, unless for good cause, to be allowed by the court, shall be no longer an attorney.³ And to lessen the causes of absence, it was ordered that every attorney of the Common Pleas shall satisfy himself with suits in that court; and shall not prosecute or follow for the plaintiffs, or plead to any action, bill, or suit, upon any process in any other court than in that, upon pain of forfeiting, for the first offence, forty shillings, and for the second, of being expelled.⁴ Attorneys who did not pay for their entries before the end of the subsequent term, were to be put out of the roll.

In the 9 Elizabeth, there was a formal and general inquiry made into the abuses of this court by Sir James Dyer, then chief-justice of the Common Pleas. A writ issued *custodi palatii nostri*, Westminster, in the king's name, to summon a jury, as well of officers as of attorneys of that court, to inquire of falsifications, rasures, contempts, misprisions, and other offences there committed. Upon the execution of this inquiry, the chief-justice made a solemn charge, which is still in being.⁵

These were regulations made in the Court of Common Pleas in this reign. There are no *orders* of the King's Bench extant.

¹ Praxis. Ut. Banc., 36.

² Ibid., 37.

³ Ibid., 66.

⁴ Ibid., 38, 55.

⁵ Ibid., 42.

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